(14,737.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 223.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY, PLAINTIFF IN ERROR,

vs.

A. R. PACE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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1–28 UNITED STATES OF AMERICA,
Eastern Division of the Western District of Tennessee.

Transcript.

In the Circuit Court of the United States within and for the Eastern Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its April term, A. D. 1891, at the United States court-house, in the city of Jackson, in said district, in the following cause, to wit:

A. R. PACE, Plaintiff,
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY, Defendant. } No. 106.

Removal from the circuit court of Dyer county, Tennessee.

Hamilton Parks, McCorry & Bond, attorneys for plaintiff.
Holmes Cummins, W. S. Draper, attorneys for defendant.

* * * * * * *

29 In Circuit Court, Dyer County, Tennessee, November Term, 1890.

A. R. PACE
vs.
THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD CO., THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY.

Declaration.

The plaintiff sues the defendant corporations for the sum of fifty thousand dollars as damages, for this: That said defendants own, operate, and control a railroad from Memphis, Tennessee, to Louisville, Kentucky, running through Dyer and other counties, Tennessee, and Graves and McCracken counties, Kentucky, and known as the Chesapeake, Ohio and Southwestern railroad, and on September 19th, 1890, plaintiff entered into a contract with defendants in Obion county, Tennessee, by which defendants, for the consideration of forty dollars per car, contracted
30 and agreed to carry twenty-nine head of cattle and to carry plaintiff as a passenger on their train with said stock from Obion station, Obion county, Tennessee, over their railroad to Louisville, Ky., which sum of forty dollars per car plaintiff contracted and agreed to pay, and in pursuance of said contract plaintiff loaded his cattle on the defendants' train at Obion station, Tennessee, on September 19th, 1890, and he took passage on said train in the caboose or car set apart for passengers,

said car being the rear car of the train; and on September 20th, 1890, said train, while running on defendants' railroad, about two miles east or north of Boaz, in Kentucky, on account of the overloaded condition of said train and the bad condition of said railroad track and of the negligent and insecure and unsafe manner in which the said train was attached or fastened together, broke in t-o and the rear part of said train, including the caboose, was left standing on the track, and defendant's servants and agents in charge
31 of said detached portion of said train neglected and failed to go back on the railroad track and flag and notify and stop another train which was following said first train, as it was their duty to do; and defendants' servants and agents in charge of the engine and front portion of said train, instead of stopping and coming back to said rear or detached portion of said train and coupling or fastening to same and carrying it forward, as they should have done, negligently, wilfully, and recklessly ran said engine and front portion of said train some half mile or mile from said rear part of said train to a water tank and there stopped and kept it standing for an unreasonable length of time, and afterwards they ran it back to said detached portion of said train at a rapid, reckless, negligent, and dangerous rate of speed, to wit, at the rate of about ten or twelve miles per hour, and struck the detached portion or
32 rear part of said train, and knocked, pushed, and forced it back west or south along said railroad track, and the shock knocked plaintiff down in said caboose, and just at that time another engine and freight train of defendants', in charge of defendants' servants and agents, was carelessly, negligently, wilfully, recklessly, and wantonly run at a great and dangerous rate of speed, to wit, at rate of about twenty-five miles per hour, upon, against, and into the detached train and caboose with a powerful force, and crushed and broke through it and ran against and struck plaintiff and knocked and threw him and the car in which he was riding off the track, and wrecked the engine and broke the car to pieces, and it greatly injured, wounded, and bruised plaintiff and broke his lower jaw and broke both -is upper jaws, breaking and crushing the bones and crushing and knocking out his teeth, and fractured his
33 skull and put out his left eye and injured his other eye, and badly hurt his hands, arms, and face, body, head, neck, and legs, and badly bruised and permanently injured his hip about the joint, and his side and back and spine, and badly cut and bruised his lip, and so badly cut and bruised his tongue that defendant's surgeons cut it off; and plaintiff's nose and ears and mouth were badly hurt and he was greatly shocked and bruised in his whole body, and his nervous system was badly injured and several blood vessels were ruptured and broken, and he was dangerously injured internally, and he bled from his nose and mouth without intermission for a long time, to wit, for about ten hours, before the surgeons could check or stop the flow of blood, and he bled frequently for a number of days after the accident, and he passed large quantities of blood from his bowels and with his urine for

some ten days or two weeks, and he spit up blood
34 for thirty or thirty-five days, and large quantities of blood and corruption ran from his mouth constantly for days, and his life was in very great danger and was despaired of, and he was forced to suffer and for a long time did suffer great and excruciating pain and agony of body and mind, and he suffers greatly and almost constantly with his hip and spine, and with earache and toothache and faceache and neuralgia, and he is unable to close his mouth or to close his teeth or jaws together, and he cannot eat or talk or taste as well as he once could, and he is unable to walk and to get about and transact his business and earn a livelihood and support for himself and his wife and children as he formerly could and did; and he alleges that his injuries and his sufferings are very great and constant and are permanent, and he is still in a terribly bad and dangerous condition. Plaintiff avers
35 that on account of said injuries he has to incur and has incurred great expense in procuring proper and necessary medical and surgical, optical, and dental treatment and attention, and in procuring proper and necessary medicines in order to alleviate his sufferings and to try to be healed or at least benefited. Plaintiff avers that at the time of his injury he was in the caboose or car used as a caboose of defendants, where he had paid or agreed to pay to be and where it was his duty to be, and that he was in the exercise of all proper care and attention, and that he in no way caused or contributed to his injury, but that one of defendants' freight trains ran against and into the rear of the train where the plaintiff was riding, and struck and wounded, bruised, and injured him, as aforesaid, on account of the gross, reckless, wanton, and criminal negligence and want of care and caution of de-
36–43 fendants' agents and servants there in charge of and operating said two trains, to his damage fifty thousand dollars. Wherefore he sues, and he asks that this cause be placed on the jury docket, and he demands a jury to try the issues in this case.

PARKS AND JOHNSTON,
Att'ys for Plaintiff.

* * * * * * *

44 In the Circuit Court of Dyer Co., Tenn., November Term, 1890.

45—91 A. R. PACE
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY CO.

In this cause the said defendant comes and for plea to the plaintiff's declaration above says:

(1.) That it is not guilty of the wrongs and injuries set forth and complained of against it in the plaintiff's declaration above.

(2.) And, for further plea, the said defendant says that the plaintiff's injuries were suffered alone by reason of his own want of proper care of himself after being fully advised of the risk and

danger in which he was being placed by his own act, and that for the injuries and sufferings resulting from such neglect and want of care of himself plaintiff has no cause of action whatever against this defendant, the same being caused by his own contributing or, rather, causing fault.

DRAPER AND PARKER,
Att'ys for said Co.

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92 & 93 UNITED STATES OF AMERICA,
Eastern Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Eastern Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its April term, A. D. 1891, at the United States courthouse, in the city of Jackson, in said district, on, to wit, the 5th day of May, A. D. 1891, in the following cause, to wit:

A. R. PACE, Plaintiff,
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY CO. and CHESAPEAKE, OHIO AND SOUTHWESTERN R. R. CO. } No. 106.

Came this day the parties to this suit, by their respective attorneys of record, when, upon motion, it is ordered that a jury do come, and thereupon came a jury of good and lawful men, to wit, S. H. Hughes, J. H. Edwards, H. D. O'Neal, A. N. McNeese, I. W. Oliver, Sam. Wallace, R. H. Cartmell, J. L. Culp, Frank Noel, W. T. Rogers, J. A. Johnson, and Dan. Morrow, who were duly elected, empanelled, tried, and sworn well and truly to try the issues herein joined and a true verdict render according to the law and evidence, when the trial of this case was commenced, and, there not being time to complete the same today, its further consideration is hereby postponed until tomorrow.

[Endorsed:] No. 106. Circuit court of the United States, western district of Tennessee. A. R. Pace *vs.* N. N. & M. V. Co. *et al.* Order of court. Entered and filed 5th day of May, A. D. 1891. John B. Clough, clerk, by —— ——, deputy.

* * * * * * *

94–97 UNITED STATES OF AMERICA,
Eastern Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Eastern Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its April term, A. D. 1891, at the United States courthouse, in the city of Jackson, in said district, on, to wit, the 7th day of May, A. D. 1891, in the following cause, to wit:

A. R. PACE, Plaintiff,
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY CO. and CHESAPEAKE, OHIO AND SOUTHWESTERN R. R. CO., Defendant-. } No. 106.

The plaintiff comes and asks leave of the court to amend the declaration filed in this particular by striking out all that part that avers that the contract of carriage of September 19th, 1890, was with the Chesapeake, Ohio and Southwestern Railroad Company, and to insert that the contract of carriage was with the Newport News and Mississippi Valley Company, and to strike out of declaration the words "defendants owned;" which amendments are permitted and allowed by the court and the same made. Whereupon the plaintiff dismisses this suit as to the defendant The Chesapeake, Ohio and Southwestern Railroad Co.

[Endorsed:] No. 106. Circuit court of the United States, western district of Tennessee. A. R. Pace *vs.* N. N. & M. V. Co. *et al.* Order of court. Entered and filed 7th day of May, A. D. 1891. John B. Clough, clerk, by —— ——, deputy.

98 UNITED STATES OF AMERICA,
Eastern Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Eastern Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its April term, A. D. 1891, at the United States courthouse, in the city of Jackson, in said district, on, to wit, the 11th day of May, A. D. 1891, in the following cause, to wit:

A. R. PACE, Plaintiff,
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY CO., Defendant. } No. 106.

Came again the said parties, by their respective attorneys, and the jury heretofore empanelled and sworn herein, when the trial of this case was again resumed, and the jury, having heard the evidence, listened to the arguments of counsel, and received the charge of the court in this behalf, upon their oaths do say they find the issues herein in favor of the said plaintiff and against the said defendant and assess the plaintiff's damage and recovery against
99 the said defendant at the sum of eight thousand dollars.

On motion of the plaintiff, it is therefore hereby ordered and considered by the court that plaintiff, the said A. R. Pace, do have and recover of and from defendant, the said Newport News and Mississippi Valley Company, said sum of eight thousand dollars, together with the costs of this case, for the collection of which said judgment and costs execution is hereby awarded.

100 UNITED STATES OF AMERICA,
Eastern Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Eastern Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof begun and held for its April term, A. D. 1891, at the United States court-house, in the city of Jackson, in said district, on, to wit, the 15th day of June, A. D. 1891, in the following cause, to wit:

A. R. PACE, Plaintiff,
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY CO., Defendant. } No. 106.

Came again this day the parties to this suit, by their respective attorneys, when the said defendant, by its attorneys, moves the court for a new trial herein because the verdict was excessive and because of errors committed in the admission of evidence in plaintiff's favor against the defendant's objection, and because of errors in the rejection of evidence offered by defendant, and because of errors in the charge in qualifying defendant's requests, and because of errors in the charge as given; which motion is hereby
100½ overruled by the court and a new trial denied and refused; whereupon the defendant moved the court in arrest of judgment upon the verdict herein; which motion is hereby overruled by the court.

[Endorsed:] No. 106. Circuit court of the United States, western district of Tennessee. A. R. Pace *vs.* N. N. & M. V. Co. Order of court. Entered and filed 15 day of June, A. D. 1891. John B. Clough, clerk, by —— ——, deputy.

101 Circuit Court of the United States, Eastern Division, Western District of Tennessee.

A. R. PACE
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY CO. } No. 106. Bill of Exceptions. Filed June 15, 1891.

On the trial of this case the plaintiff introduced evidence tending to show that on the 19th of September, 1890, he entered into a written contract with the defendant for the transportation of a carload of cattle from defendant's station at Obion, in Tennessee, to Louisville, Kentucky, for forty dollars, including the transportation of himself on the same train with such cattle for the purpose of looking after and attending to them; that during that night, while passing over the road, the train in which he was carried became uncoupled, and the rear portion, on which plaintiff was, was stopped, while the front part ran some distance beyond; that when the front portion of his train, # 1, had been gone 30 minutes

it returned very rapidly, striking the cars on which
102 plaintiff was riding violently and knocked them back down the road 100 yards, and a moment thereafter another train, passing in the same direction he had been going, crashed violently into plaintiff's train, completely demolishing the car in which he was and severely injuring and bruising him, breaking his lower jaw, fracturing his upper jaw, displacing his lower jawbone, closing one nostril, injuring the sight of both eyes and the hearing of one ear, breaking the molar bone as well as cutting off a portion of his tongue, besides inflicting bruises upon other parts of his person; that he was immediately cared for by defendant's employees, carried to the nearest hospital, provided with surgical and other attention, nursed, and cared for as carefully as could be done, but resulting in his confinement for some weeks; that plaintiff passed quantities of blood from bowels and bladder for some weeks; also tend-
103 ing to show that these injuries caused him great anxiety, pain, and suffering, bodily and mental; that his life was seriously endangered and shortened, his recovery for some time uncertain, and that these injuries were permanent as to the dislocation of the jaw, which had previously come together properly, the resulting inability to properly close his mouth or masticate his food; that necrosis of molar bone resulted; that these wounds had not yet healed, but were still sore and running matter; that prior to said accident he was 36 years of age and in good health. Plaintiff further introduced proof tending to show that his business had been that of a cattle trader, a dealer in stock, and that because of these injuries he could not henceforth follow this business as well as before being hurt nor without risk and danger; also tending to show that he was a sober and industrious money-making man, and that his business had been a
104 profitable one. Against defendant's objection, plaintiff farther introduced evidence tending to show that he was a moral, upright man, of good character for honor and integrity. This evidence was offered in chief, when nothing tending to impeach plaintiff's character had been offered by defendant, and was objected to by defendant as not competent in any respect nor specially for the purpose of showing what his damages were or estimating the measure thereof. This objection of the defendant was overruled by the court and the evidence allowed to go to the jury, the court saying that this is a question that goes to the measure of damages and may go to the jury for what it may be worth in estimation of the injury done. The objection is overruled. Also the plaintiff, in connection with the testimony offered to show that the plaintiff had a reputation for honor and integrity and was a good business man, asked questions as to plaintiff's character for
105 truth and veracity, which were objected to by defendant as incompetent, irrelevant, and immaterial; which objection was also overruled by the court, stating as a ground that it was not admitted to sustain plaintiff's character as a witness, but to show his qualities as a man in respect to the measure of damages.

Again, notwithstanding objection by defendant, the plaintiff was

permitted to offer evidence tending to show that at the place of the collision the railroad track was rough, with many low joints and rotten ties, and in very bad condition at the time of the wreck; and again, notwithstanding defendant's objection, the plaintiff was allowed to prove by his wife on re-examination as follows: Among other things, in cross-examination of plaintiff's wife defendant asked her:

X Quest. 15. How do you know that he (plaintiff) suffered greatly?

Ans. Because he complained a great deal, didn't sleep any, and was very restless.

106 X question 16. Do you know that he has suffered greatly with toothache and earache in the same way—that is, because he complained of it?

Ans. I knew that he complained of his teeth and ear aching, and that he wanted to have them pulled out, and the doctor was afraid to pull them out. He was doctored for the toothache and earache.

Whereupon plaintiff on re-examination asked and was answered as follows, notwithstanding defendant's objection:

"Q. You were asked about how you know that your husband suffered from his said injuries, and you say that he complained of suffering. You may state when he made such complaint and what kind of suffering he complained of, and whether or not he has been wakeful at night and has lost sleep on account of his suffering.

"A. He made complaint of suffering at Paducah and since he left Paducah up to the present. He complained last night of his back and hip hurting him, and of his face. This was after midnight. And after we had retired for the night he woke me up complaining and saying that he had not slept any for two or three hours. He has complained ever since we came home from Paducah and all the time at Paducah, when he complained at all, which was

107 nearly all the time, of his hip and back and his jaw-bones and his teeth and tongue and his eye. Before the accident occurred he always slept very soundly; since the accident he has been very wakeful and restless at night."

The defendant offered evidence tending to show that at the time plaintiff's train broke in two or became uncoupled he was warned both by the conductor and brakeman of the danger of their position and of the fact that another train was following them and might not be signalled in time to prevent a collision, and that safety required him to get off of the cars and look out lest he be killed, all of which was denied by the plaintiff. Also tending to show that while proper and sufficient signals against the following train, as required by the rules (compliance with which would have prevented the accident), had not been given by its employees, yet that

108 its brakesman did go back more than 1,000 feet behind where plaintiff's train had stopped, and that signals were properly placed and given there, but that it was impossible from that point to have stopped the following train in time to have avoided the col-

lision. The defendant offered proof tending to show that other persons' jaws naturally failed to come together any more closely than plaintiff's since his injury. This also was excluded on plaintiff's objection. That plaintiff was feigning his injury and was not hurt so much nor so seriously as he claimed; that for three months he claimed to have lost all sight from his left eye. However, that at defendant's instance an examination by a commission of a half dozen physicians, surgeons, dentists, etc., was made of plaintiff, who found that plaintiff was seeing quite well with that eye at the very time he was complaining of being blind.

109 The defendant requested the court to instruct the jury as follows:

If you find from the proof that just previous to the collision plaintiff was warned by the conductor and brakeman of the danger of going to sleep or remaining in the car in which he had been riding while it was standing on the track, and if you further find that plaintiff, after being so warned, then could have escaped, such negligence then will bar him from such recovery; or if you find from the proof that plaintiff was told by the conductor and brakeman of the danger, and that he had time after such warning to avoid the danger and neglected to do so, that would prevent his recovery from the company; which requests were granted. However, the court qualified defendant's request as follows: But if you find that after the train broke loose the conductor came back and told the brakeman to go back and flag, and then told Pace the train

110 was following, and for fear of accident he had better watch out for it, and if he saw it to get out of the way, this would not be such warning as would make plaintiff's negligence contributory unless he knew of the danger in time to get out and avoid the injury; and in considering this you will consider that plaintiff had a right to rely upon the rules being obeyed and all proper precautions being taken to warn the approaching train of the obstruction and delay, such as prudence required the management to adopt, and he must have been warned about the necessity for leaving the caboose before negligence contributing to the injury can be attributed to him. You must find not only the fact that plaintiff was warned, but that the warning came to him in such words and under such circumstances that a reasonable man, using ordinary care for his own safety, could have avoided the danger; if so, he cannot recover

111 To which defendant excepted; and defendant further excepted to the charge as given as follows: "You cannot have any very satisfactory scale of measurement to fix it (plaintiff's damage) by. It is of such a character that no intelligent mind can find anywhere any satisfactory fixed standard of judgment." * * * "You look into its character and extent of the injury, to its duration in point of time, and in every way you can conceive from this proof that Mr. Pace can be physically affected by the injury received by him." * * * "On the other hand, the defendant is not going to produce any doctor with an opinion than Pace's injuries are serious and so they bring up another class of doctors." That is natu-

ral, for the defendants to do this, and there is nothing wrong about it. But you, gentlemen of the jury, are to take the testimony of the doctors on both sides and weigh it in view of the fact that they are such witnesses as we call experts and are pro-
112 duced to you under the circumstances I have mentioned." "In consideration of this question of damages accruing to Mr. Pace's character, it is quite easy for a jury or for anybody to be misled. Now, a railroad company has no more right to kill a worthless vagabond, when accepted as a passenger, than to kill the President of the United States. Its obligation is just the same to carry him safely, and his right to compensation just the same; but you will see that, when you go to determine the amount of damages that has been inflicted upon one by such an injury, his character is a very important element in it. A man who is worthless and never earns a dollar, but is a burden upon his family—a vagabond and a trifling, worthless fellow—certainly is not worth as much as some man who is the opposite of all that—a worthy citizen, a good man, and a blessing to his family, a blessing to the community; and you have a right, in deter-
113 mining the question *the question* of the amount of damages, to look to the quality of the thing that has been injured, and for that reason proof has been admitted before you, so that you may know just what manner of man Mr. Pace is and so that you may say how much his character and qualities as a man may be regarded in measuring these damages against the railroad company for its negligence, if he has not contributed to it."

The court instructed the jury as follows:

GENTLEMEN OF THE JURY: When this case commenced you remember that counsel promised that it would take about two days; as a matter of fact, it has taken six. The plaintiff introduced fifty-two witnesses; the defendant introduced fifteen. They consumed, the plaintiff five hours and 37 minutes in argument, the defendant three hours and 37 minutes. They have introduced, as you are aware, the most elaborate and extensive proof as to all the facts and circumstances surrounding this wreck
114 and no complaint can be — of the court and jury that they have not had a fair opportunity to try this case; in time, amount of evidence, and argument, and all that could be expected or asked of the court and jury has been patiently accorded to them. You and the court constitute a tribunal under our law to decide all controversies like this that arise between citizens, whatever they might be, over which we have jurisdiction. In the discharge of that function we know nothing about the parties, except so far as their circumstances and surroundings may aid us in determining what the controversy is and how it should be decided between them. As to the parties, they are unknown quantities to us. We have, on the one hand, no sympathy for them and their injuries further than that sympathy may be an element in human nature in determining the extent to which they have been
115 injured. On the other hand, we have no prejudice, by reason of

the fact that we are dealing with bad men or with corporations or with any class of persons against whom there is prejudice existing in the minds of juries or the community. We, sitting here in the jury-box and on the bench, know nothing of that further than the wickedness of men or of corporations may be rightfully considered by the jury and by the court in determining controversies like this. We are to look at the cool questions of law and fact as they exist in the proof before us, and to determine this controversy as fair and impartial men, determined to do justice between these two parties, and to do it intelligently. What the court wants, and what you want when you come to test your judgment by your verdict, is that kind of criticism which will come from intelligent men—to be, above all things, an intelligent judgment. It cannot be intelligent unless it is honest and fair and impartial. It cannot be intelligent un-
116 less it conforms to the standard of reasonable knowledge and information among men as to what ought to be decided under such circumstances as that. Now, gentlemen of the jury, the liability of the defendant is not at all denied. It is wholly immaterial how this collision happened; whether by reason of some defect in the road-bed or by bad management of the trains or failure of the flagman to warn section 2, or whether a combination of all these, is wholly immaterial. The railroad company is liable to this plaintiff for whatever damages he received, if he is entitled to a recovery under that proof, without reference to the nature and cause of the collision; because whenever a railroad company undertakes to carry a passenger the law imposes upon the company the duty and obligation to carry him safely. I do not say there are not circumstances under which the railroad company could show that two railroad trains on its track collided without fault of
117 the company. It is possible to imagine some circumstances under which it would not be in fault; but the circumstances would be very exceptional and are not set up or pretended in this case. It is conceded that they were negligent in bringing about this collision, and that unless there is some fact on the part of plaintiff that relieves them, they are liable for whatever damages he may have sustained. Now, there are circumstances, gentlemen of the jury, when you would be entitled not only to compensate a passenger for injury in a collision like this, but when a jury could exercise a power, wisely left with it, of adding to the damages some amount that would make the company feel that it could not neglect its duty in reference to a passenger without being severely punished by damages through the verdict of a jury or sometimes punished by indictment, even, for crimmal carelessness in not preventing accidents upon its road;
118 but this is not a case for the exercise of that power. It is conceded by the learned counsel for plaintiff that nothing was found here to show wilful carelessness on the part of those who managed this train. Here were two railroad trains passing over the ordinary line in the business of this company; they were freight trains, managed as freight trains and for carrying freight; not fitted up for passengers nor for the purpose of securing the

safety of passengers, but for the purpose of carrying the freight contained in those cars. They made a contract with this plaintiff that he might ride on those cars as part and parcel of carrying his cattle, and when they accepted him as a passenger in that way they owed him all safety in carrying that they were bound to accord to such a train as that—that is to say, they were bound to use care in carrying him safely upon their freight trains, but not such
119 special care, perhaps, as if he had been travelling on a passenger train, where it is the duty of the company to exercise the utmost care for the lives of the passengers; but he was entitled to have all those provisions for safety which would ordinarily prevent accidents. He did not receive that care in this case and is therefore entitled to recover by reason of their negligence, but not, as they concede on his part, any punitive damages such as might exhibit your indignation and determination to compel this railroad company, by punishment, to perform its duty. That being so, it is not necessary to go into the negligence as gross or otherwise, and therefore you need not consider that question at all. There are, therefore, only two questions in this case—one contributory negligence and the other as to the amount of damages. First, as to contributory negligence: If you find from the proof that just previous to the collision plaintiff was warned by the conductor and brake-
120 man of the danger of going to sleep or remaining in the car in which he had been riding while it was standing on the track, and if you further find that plaintiff, after being so warned, could have escaped, such negligence will bar him from a recovery; or if you find from the proof that plaintiff was told by the conductor and brakeman of the danger, and that he had time after such warning to avoid the danger and neglected to do so, that would prevent his recovery from the company; but if you find that after the train broke loose the conductor came back and told the brakeman to go back and flag, and then told Pace the train was following and for fear of accident he had better watch out for it, and if he saw it coming to get out of the way, this would not be such warning as would make plaintiff's neglect contributory unless he knew of the danger in time to get out and avoid the injury; and in considering this you will consider that plaintiff had a right to rely upon
121 the rules being obeyed and all proper precautions being taken to warn the approaching train of the obstruction and delay to the preceding train—such precautions as prudence required the management of the trains to adopt—and he must have been warned about the necessity of leaving the caboose before negligence contributing to the injury can be attributed to him. You must find not only the fact that plaintiff was warned, but that the warning came to him in such words and under such circumstances that a reasonable man, using ordinary care for his own safety, could have avoided the danger. If so, he cannot recover. If, however, gentlemen, you find no contributory neglect under these instructions, then the only question for you to consider is the amount of damages to award the plaintiff. Now, as counsel for the defendant well says, you are not authorized in awarding damages to shovel

out defendant's money as with a grain scoop, nor, on the
122 other side, are there any delicate golden scales with which you can weigh it for the plaintiff. Necessarily, such an award is to be made by you, or by every other human intelligence, with fairness to all, and it must depend upon your impartiality, your sense of — and fairness, your intelligent judgment as to the considerations which properly enter into, from inquiry, as an element of damages; and, while you must decide arbitrarily, it is true, but upon the proof, what it — take to compensate the plaintiff for the injuries he has received, you must act reasonably. You cannot have any very satisfactory standard of measurement to fix it by. It is of such a character that no intelligent mind can find anywhere any satisfactory fixed standard of judgment. On the one hand, you do not want to compensate this man in a niggardly, stingy, or mean way, so that intelligent and fair-minded men
123 elsewhere will say that he has been injured and been compensated for it in a mean, stingy, and niggardly way. On the other hand, you do not want to loot and plunder the treasury of this railroad company because, forsooth, it has been so unfortunate as to injure this man severely. You want to avoid, on the one hand, being impelled by your sympathy with his suffering, to overestimate the actual damages that have been received by Mr. Pace; you do not want to allow any emotion and sentimental notion to enter into the idea of compensation; and, on the other hand, you do not wish to be impelled by indignation at the railroad company to make you say, "Here is a man injured, and we will loot and plunder and give him extravagant damages for it." But he has a right to demand, and this company must be required to pay him, if you find he has not contributed to this injury, whatever damages he has received that will fairly and honestly and
124 impartially compensate him for his suffering and for his injuries. In considering this, perhaps the most important element for your judgment is the character of the injury that he received. Is it merely temporary or is it permanent? Is it extensive and all-pervading and all-destroying, or is it of a slight degree and will not last? You want first to determine in your own minds fairly, impartially, and intelligently, from the proof before you and from your own judgment as men of affairs, what is the character and nature of the injury inflicted upon him. When you have determined that, you have gone a long step in determining what should be your calculation of what damages he is entitled to. If you find his injuries permanent, but only slight, not as much damage as if permanent and very great; and if very great, but only temporary, you would not accord the same damages as if very
125 great and at the same time permanent. You look into the character and extent of the injury and as to its duration in point of time, and in every way you can conceive from this proof that Mr. Pace can be physically affected by the injury received by him. Now, for the defendant it is said that the plaintiff simulates and exaggerates the injuries he has received. If this is so, it is only a question of evidence and only goes to the credit of Pace as

a witness, and goes to show you that his injuries are not as great as he says they are. It does not follow that because he has falsified the extent of his injuries that he cannot recover at all from this railroad company; that does not follow at all; but it only follows that you will take that fact into consideration in determining the other fact as to whether they are permanent or only slight. On the other hand, the plaintiff says that the witnesses for the defense
126 have reduced the injuries to a minimum and belittled the injuries received by Pace. If this is so, it is for you to determine, in considering your verdict in this case, whether that is so or not. If so, it does not entitle you to give extravagant damages against the railroad company, but only goes to the question of evidence as to whether Pace is injured slightly or whether his injuries are greater. I warn you against looking upon these charges and counter-charges as going to the measure of damages and affecting the amount. It is only a question for you to determine in weighing the proof and saying whether they are great or whether they slight; and I may say here that it is human nature for the plaintiff to exaggerate when he is asking money for them, and, on the other hand, just as much human nature for the defendant to belittle them. Therefore we may expect to find in the argu-
127 ments of counsel a disposition on the part of the plaintiff to magnify the injury, and of defendant to ridicule and underrate the injury. But you are to try to find out the truth, notwithstanding these tendencies on either side, and to determine just what the truth is, and to predicate your judgment upon an intelligent and fair consideration of this proof upon that question. Now, I wish to call your attention for a moment to the testimony of the doctors that have been examined and what the law calls "expert medical testimony." They character that they enjoy as medical men is known to you from this proof. On the one side, seventeen doctors have been introduced by the plaintiff, and on the other side seven by the defendant; and there they stand, two antagonistic classes of experts. Unfortunately, gentlemen of the jury, in our law this testimony of experts, as we take it and as we have it, is
128 subject to the defect that the experts are selected by the parties themselves. Now, the plaintiff, who is seeking to recover damages for his injury, is not going to produce to you any medical expert who gives an opinion adverse to him. He will introduce the doctors who think he has been injured the worst. You would do it; I would do it; we all would do it. We put the best foot foremost, and we get those most friendly to us to testify for us. On the other hand, the defendant is not going to produce any doctor with an opinion that Pace's injuries are serious, and so they bring up another class of doctors. That is natural for the defendant to do, and there is nothing wrong about it; but here you step in with your function, and you, gentlemen of the jury, are to take the testimony of the doctors on both sides and weigh it in view of the fact that they are such witnesses as we call experts, and are produced to you under the circumstances I have mentioned.
129 The same thing is true as to all kinds of expert testimony.

Our law leaves to each party to produce his own experts, and necessarily we have to deal with them as showing that difference in judgment which we find each side maintaining; but when we take the testimony as that of learned medical men, and they are learned men, we will have no difficulty in giving just that measure of weight to the evidence which it deserves, notwithstanding this partiality. I think you will find no difficulty, with all the medical evidence given you, in reaching a fair, impartial, and intelligent estimate of Mr. Pace's injuries. Some have thought that it would be better if experts like these medical men could be selected by the court, without reference to either party, and brought in to give their impartial judgment without having been previously retained or consulted by the parties; but our statutes have not provided for this, or, at least, the court is not authorized to compensate them, and
130 we do not like to insist upon their rendering the service without compensation, and we must allow each party to bring such experts as he pleases. But you will look at all this proof of the medical men for the sole purpose of determining the character of Mr. Pace's injuries intelligently and impartially, and make upon your judgment, as best you may, whether he has been permanently or temporarily injured. Now, if you find from the proof that the injuries for which the plaintiff sues could have been relieved, wholly or partially, by surgical or dental treatment, and that he was advised to have and failed to have such treatment, then you will not assess against defendant beyond the time such relief could have been had and the cost of it. Mr. Pace must not neglect himself and neglect medical advice, and do it unfairly and unreasonably, and then claim damages for injuries that might have been relieved by surgical and medical treatment; but he
131 would be entitled to recover, as an element of damages, the cost of that treatment which would put him in such condition as he was before, as nearly as possible, and also for the suffering and expenses which he had, and for the remaining permanent injury which existed in this case. That is fair and reasonable. You can see that, and every reasonable man can see it. So, in considering this question of damage to Mr. Pace to be awarded, you are to consider if he could have been or yet could be relieved by medical treatment of any of the injuries received, so that they would not be so serious to him; and if you find that he has unreasonably and, under the circumstances of this case, unwisely neglected to submit to such treatment, that will be considered by you as affecting the nature, character, and amount of damages which he has received. Now, the next and only question I feel that it is necessary to call your attention to
132 is the effect of the proof given about Mr. Pace's character and qualities. I am asked by counsel to say that you look to his suffering, both of body and mind, in assessing the damages. I have already said that to you. And I am asked to say that you will look to the question of whether his general health has been affected to any extent so as to shorten his life. I have said that in saying that you would determine the nature and character and ex-

tent of Mr. Pace's injuries. Of course, if you find that they have shortened his life, you will consider that in assessing the nature and character of the injuries. I have invited you to go over the whole field and look at it and say how seriously and how extensively and how permanently or how slightly or how temporarily he has been injured. Look at all the proof in the case, the nature and character of the case, the suffering of body and mind. In consid-
133 eration of this question of damages according to Mr. Pace's character, it is quite easy for a jury, or for anybody, to be misled. A railroad company has no more right to kill a worthless vagabond, when accepted as a passenger, than to kill the President of the United States. Its obligation is just the same to carry him safely, and his right to compensation just the same; but you will see that, when you go to determine the amount of damage that has been inflicted upon one by such an injury, his character is a very important element in it. A man who is worthless and never earns a dollar, but is a burden upon his family—a vagabond and a trifling, worthless fellow—certainly is not worth as much as some man who is the opposite of all that—a worthy citizen, a good man, and a blessing to his family, a blessing to the community; and you have a right, in determining the question of the amount of damages, to look to the quality of the thing that has been injured, and for that reason proof has been admitted
134 before you so that you may know just what manner of man Mr. Pace is, and so that you may say how much his character and qualities as a man may be regarded in measuring these damages against the railroad company for its negligence, if he has not contributed to it. Now, it is easy enough to be somewhat mislead about that, and — not allow it to carry you too far in estimating the damages. Because he is a good man and honest and a fine money-maker and in every way possesses every quality that makes him a blessing and an ornament to society is no reason why he should plunder or loot the railroad company. In other words, you do not want to give too much for him, if he is that kind of character, any more than you would want to give too much for a good horse. You are willing to give more for him than for an old plug, but you don't want to give more than he is worth; and it comes back for a fair, intelligent, and impartial jury to determine
135 what will compensate that man, not some other man, not for some other injury, but for the injury he actually has received. It is a cold question of dollars and cents, and you have got to deal with it as such, and you are not to be affected by any other verdicts or any other estimates that may have been called to your attention of the value of other injuries and other damages. Each case depends upon itself, and it is wholly immaterial to you how much or how little could have been given by other courts and juries to other men for other injuries. The question with you is, How much is this man entitled to receive for these injuries as you find this man described to you in the proof and as you find these injuries defined to you in the proof? On every side cases can be read; on one side where enormous amounts have been allowed for

damage and sustained; and, on the other hand, I know of one case where only $100 was allowed for the death of a party. Well, between these small and large amounts there are no
136 two cases that agree in the amount—agree in circumstances and the extent of the injury or amount of damages—and you will have to be guided solely by the principle of compensation for the injuries to the plaintiff in this case as you find them described to you in the proof. I believe, gentlemen of the jury, when I look into your faces, that when you go out to consider this question you will consider it as impartially and honestly as you should consider it, and that it will be said of you and your verdict that it is a fair and impartial verdict. Take the case, gentlemen.

To which charge as given defendant excepted.

The jury having thereupon returned a verdict in favor of the plaintiff for $8,000.00, and judgment being rendered thereon, defendant moved the court for a new trial because the verdict was excessive and because of errors committed in admission of
137 evidence in plaintiff's favor against defendant's objection, and because of errors in rejection of evidence offered by defendant and because of errors in the charge in qualifying defendant's requests and in the charge as given; and, the court overruling said motion and defendant's further motion in arrest of judgment, the defendant again excepted and tendered this its bill of exceptions, which is signed, sealed, and made a part of the record.

E. S. HAMMOND, *Judge, &c.* [SEAL.]

Jackson, Tenn., June 15th, 1891.

Filed June 15th, 1891.

J. B. CLOUGH, *Clerk.*

138 In the Circuit Court of the United States within and for the Western District Tennessee, Eastern Division, at Jackson.

A. R. PACE, Plaintiff,
vs.
NEWPORT NEWS & MISS. VALLEY CO.

Know all men by these presents that we, The Newport News & Mississippi Valley Company, as principal, and Holmes Cummins and John Echols, as surety-s, are held and firmly bound unto A. R. Pace in the sum of twelve thousand dollars, to be paid to the said A. R. Pace; to which payment, well and truly to be made, we and each of us bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with seals; signed and dated this 15th day of June, A. D. 1891.

Whereas the above-named Newport News & Mississippi Valley Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named Newport News & Mississippi Valley Company shall prosecute the said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise remains in full force and virtue.

NEWPORT NEWS & MISSISSIPPI VALLEY CO.,
By its attorney, HOLMES CUMMINS. [SEAL.]
HOLMES CUMMINS. [SEAL.]
JNO. ECHOLS. [SEAL.]

Acknowledged before me this 15th day of June, 1891.

JOHN B. CLOUGH, *Clerk.*

This bond is hereby approved on the date of its said acknowle-gement before the clerk.

E. S. HAMMOND, *Judge.*

Filed same day.

JOHN B. CLOUGH, *Clerk.*

139 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the western district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you, between A. R. Pace, plaintiff, and The Newport News and Mississippi Valley Company, defendant, a manifest error hath happened, to the great damage of the said defendant, The Newport News and Mississippi Valley Company aforesaid, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 187–, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Jackson, this 15th day of June, A. D. 1891, and 115th of American Independence.

[SEAL.] JOHN B. CLOUGH, *Clerk.*

W. O. Christie is hereby appointed special deputy U. S. marshal, district of west Tennessee, to execute and return the within writ.

Given under my hand and seal this 27th day of June, 1891.

J. W. BROWN, *Marshal.* [SEAL.]

140 I have this day executed the within writ of error on the defendant in error, A. R. Pace, by making known to him the contents of said writ and leaving with him a copy thereof. Said writ was served on said defendant in Dyer county, in the State of Tennessee, on this the 30 day of June, 1891.

J. W. BROWN,
U. S. Marshal,
(Sign here.) By W. O. CHRISTIE, *Deputy.*

Serv.....	2 —
11 miles.....	66
Fees.....	2 66

[Endorsed:] No. 106. Circuit court of the United States, western district of Tennessee. Newport News & Miss. Valley Company *vs.* A. R. Pace, defendant in error. Writ of error. Issued the 15th day of June, A. D. 1891. J. B. Clough, clerk.

141 UNITED STATES OF AMERICA:

To A. R. Pace, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, 1891, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the circuit and western district of Tennessee, wherein The Newport News and Mississippi Valley Company is plaintiff and you are defendant in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable E. S. Hammond, judge of the district court of the United States for the western district of Tennessee, this 15th day of June, A. D. 1891.

E. S. HAMMOND, *Judge.*

142 [Endorsed:] No. 106. Circuit court of the United States, western district of Tennessee. Newport News & Miss. Valley Company *vs.* A. R. Pace. Citation. Filed the 15th day of July, A. D. 1891. J. B. Clough, clerk.

I have this day executed the within summons on the defendant in error, A. R. Pace, by making known to him the contents of said writ and leaving with him a copy thereof. Said writ was served on said defenda- in Dyer county, in the State of Tennessee, on this 30 day of June, 1891.

J. W. BROWN,
U. S. Marshal,
(Sign here.) By W. O. CHRISTIE, *Deputy.*

[On margin:] 1 serv., 2 —.

W. O. Christie is hereby appointed special deputy U. S. marshal, district of west Tennessee, to execute and return the within writ.

Given under my hand and seal this 27th day of June, 1891.

J. W. BROWN, *Marshal.* [SEAL.]

143 THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee.

I, John B. Clough, clerk of the circuit court of the United States for the eastern division of the said western district of Tennessee, do hereby certify that the papers hereto attached are a full, true, perfect, and correct copy of the entire record and proceedings in said court, as the same now appear of record and upon the files in my office, in the following cause, to wit: A. R. Pace *vs.* The Newport News and Mississippi Valley Company, No. 106.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office, in the city of Jackson, Tennessee, this sixth day of July, A. D. 1891, and of the Independence of the United States the 116th year.

Seal of the Circuit Court of the United States for the District of West Tennessee.

JOHN B. CLOUGH, *Clerk.*

[Endorsed:] No. 106. Circuit court of the United States, western district of Tennessee, eastern division. A. R. Pace *vs.* Newport News and Miss. Valley Co.

144 In the Supreme Court of the United States.

THE NEWPORT NEWS & MISSISSIPPI VALLEY COMPANY
v.
A. R. PACE.

In this cause, under subsec. 9 of rule 10 of the rules of this court, the plaintiff in error, in connection with its assignment of errors herewith filed, directs that only the following parts of the transcript of the record from the trial court be printed, these being the only parts of the record necessary for the consideration of the case on the errors assigned, viz:

Caption	page 1
Declaration	" 29–36
Plea or issue	" 45
Trial begun, etc.	" 92
Dismissal as to C., O. & S. W.	" 94
Judgment	" 98–99
Order ag'st new trial, etc.	" 100
Bill — exceptions	" 101–137

Of this the defendant in error will please take due notice.

HOLMES CUMMINS,
Attorney for Plaintiff in Error, N. N. & M. V. Co.

145 In the Supreme Court of the United States.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY
against
A. R. PACE.

The plaintiff in error assigns error on the record from the trial court as follows:

(1.) That the trial judge, notwithstanding the objection of plaintiff in error, allowed the defendant in error to offer to the jury evidence tending to show that "he was a moral, upright man, of good character for honor and integrity." This evidence was offered in chief, when nothing tending to impeach plaintiff's character had been offered by defendant, and was objected to by defendant as not competent in any respect, nor especially for the purpose of showing what his damages were or estimating the measure thereof. This objection of the defendant was overruled by the court and the evidence allowed to go to the jury, the court saying that "this is a question that goes to the measure of damages and may go to the jury for what it may be worth in estimation of the injury done. The objection is overruled."

Record, p. 104.

(2.) That the trial judge, notwithstanding the objection of plaintiff in error, allowed defendant in error to show plaintiff's character for truth and veracity, the court stating that it was not ad-
146 mitted to sustain plaintiff's character as a witness, but to show his qualities as a man in respect to the measure of damages."

Record, page 104, '5.

(3.) That the trial judge, notwithstanding the objection of plaintiff in error, permitted defendant in error to offer evidence tending to show "that at the place of the collision the railroad track was rough, with many low joints and rotten ties, and in very bad condition at the time of the collision," such condition of the track and road-bed having no relation to the cause of the injury sued for, which was a rear-end collision of two freight trains.

Record, page 105.

(4.) That the trial judge, notwithstanding the objection of plaintiff in error, allowed defendant in error to prove by his wife as follows: Among other things, on cross-examination of plaintiff's wife, defendant asked her, "How do you know that he suffered greatly?" to which she answered, "Because he complained a great deal; didn't sleep any, and was very restless." Question. "Do you know that he has suffered greatly with toothache and earache in the same way—that is, because he complained of it?" Answer. "I knew that he complained of his teeth and ear aching, and that he wanted to have them pulled out, and the doctor was afraid to pull them out. He was doctored for the toothache and earache." Whereupon plaintiff on re-examination asked and was answered as follows, notwithstanding defendant's objection: "You were asked about how you

know that your husband suffered from his said injuries, and you say he complained of suffering." Answer. "He made com-
147 plaint of suffering at Paducah and since he left Paducah, up to the present. He complained last night of his back and hip hurting him, and of his face. This was after midnight and after we had retired for the night. He woke me up complaining and saying that he had not slept any for two or three hours. He has complained ever since we came home from Paducah, and all the time at Paducah, when he complained at all, which was nearly all the time, of his hip and back and his jaw-bones and his teeth and tongue and his eye. Before the accident occurred he always slept very soundly. Since the accident he has been very wakeful and restless at night."

Record, pages 105, '6, '7.

(5.) That the trial judge excluded evidence offered by plaintiff in error tending to show that the jaws of many persons naturally failed to approximate nearer than plaintiff (below) complained of his doing as the result of his injury.

Record, page 108.

(6.) That the trial judge in charging the jury, as requested by plaintiff in*n* error, as follows: "If you find from the proof that just previous to the collision plaintiff was warned by the conductor or brakeman of the danger of going to sleep or remaining in the car in which he had been riding while it was standing on the track, and if you further find that the plaintiff, after being so warned, then could have escaped, such negligence, then, will bar him from such recovery; or if you find from the proof that plaintiff was told by the conductor and brakeman of the danger, and that he had time, after such warning, to avoid the danger and neglected to do so, that would prevent his recovery from the company,"
148 qualified such instruction as follows:

"But if you find that after the train broke loose the conductor came back and told the brakeman to go back and flag, and then told Pace the train was following and for fear of accident he had better watch out for it, and if he saw it to get out of the way, this would not be such warning as would make plaintiff's negligence contributory unless he knew of the danger in time to get out and avoid the injury; and in considering this you will consider that plaintiff had a right to rely upon the rules being obeyed and all proper precautions being taken to warn the approaching train of the obstruction and delay such as prudence required the management to adopt, and he must have been warned about the necessity for leaving the caboose before negligence contributing to the injury can be attributed to him. You must find not only the fact that plaintiff was warned, but that the warning came to him in such words and under such circumstances that a reasonable man, using ordinary care for his own safety, could have avoided the danger. If so, he cannot recover."

(7.) That the trial judge instructed the jury that "you cannot

have any very satisfactory scale of measurement to fix it (plaintiff's) damage by. It is of such a character that no intelligent mind can find anywhere any satisfactory fixed standard of judgment. You look into its character and extent of the injury, to its duration in point of time, and in every way you can conceive from this proof Mr. Pace can be physically affected by the injury received by him."

149 (8.) That the trial judge instructed the jury as to the weight of the evidence offered by plaintiff in error from various medical and surgical attendants of the defendant in error as follows: "On the other hand, the defendant is not going to produce any doctor with an opinion that Pace's injuries are serious, and so they bring up another class of doctors. That is natural for defendants to do this, and there is nothing wrong about it; but you, gentlemen of the jury, are to take the testimony of the doctors on both sides and weigh it, in view of the fact that they are such witnesses as we call experts and are produced to you under the circumstances I have mentioned."

Record, pp. 111, 112.

(9.) That the trial judge instructed the jury as follows:

"In consideration of this question of damages accruing to Mr. Pace's character, it is quite easy for a jury or for anybody to be misled. Now, a railroad company has no more right to kill a worthless vagabond, when accepted as a passenger, than to kill the President of the United States. Its obligation is just the same to carry him safely, and his right to compensation just the same; but you will see that, when you go to determine the amount of damages that has been inflicted upon one by such an injury, his character is a very important element in it. A man who is worthless and never earns a dollar, but is a burden upon his family—a vagabond and a trifling, worthless fellow—certainly is not worth as much as some man who is the opposite of all that—a worthy citizen, a good man, and a blessing to his family, a blessing to the community; and you have a right, in determining the question of the amount of damages, to look to the quality of the thing

150 that has been injured; and for that reason proof has been admitted before you so that you may know just what manner of man Mr. Pace is, and so that you may say how much his character and qualities as a man may be regarded in measuring these damages against the railroad company for *his* negligence if he has not contributed to it."

HOLMES CUMMINS,
Attorney for N. N. & M. V. Co., Pl'ff in Error.

[Endorsed:] Sup. Court U. S., Oct'r term, 1891. No. 1263. The Newport News & Mississippi Valley Co., pl'ff in error, *vs.* A. R. Pace. Assignment of errors & designation by plaintiff in error of parts of record necessary to be printed.

[Stamped:] Office Supreme Court U. S. Filed Jul- 14, 1891. James H. McKenney, clerk.

151 In the Supreme Court of the United States.

THE NEWPORT NEWS & MISSISSIPPI VALLEY COMPANY
v.
A. R. PACE.

In this cause, under subsec. 9 of rule 10 of the rules of this court the plaintiff in error, in connection with its assignment of errors herewith filed, directs that only the following parts of the transcript of the record from the trial court be printed, these being the only parts of the record necessary for the consideration of the case on the errors assigned, viz:

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Trial begun, etc	" 92
Dismissal as to C., O. & S. W	" 94
Judgment	" 98–99
Order ag'st new trial, etc	" 100
Bill — exceptions	" 101–137

Of this the defendant in error will please take due notice.

HOLMES CUMMINS,
Attorney for Plaintiff in Error, N. N. & M. V. Co.

Due notice of above, with assignment of errors, received and acknowledged.

10 July, 1891.

HAMILTON PARKS,
Attorney for said A. R. Pace.

152 [Endorsed:] Sup. Court U. S., Octo. term, 1891. No. 1263. The Newport News & Mississippi Valley Co., pl'ff in error, *vs.* A. R. Pace. Acceptance of notice by def't in error of parts of record to be printed.

[Stamped:] Office Supreme Court U. S. Filed Jul- 31, 1891. James H. McKenney, clerk.

Endorsed on cover: Case No. 14,737. W. Tennessee C. C. U. S. Term No., 223. The Newport News and Mississippi Valley Company, plaintiff in error, *vs.* A. R. Pace. Filed July 13, 1891.

(14,737.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 223.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY, PLAINTIFF IN ERROR,

vs.

A. R. PACE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1895.

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* * * * * * *

1 & 2 Circuit Court of the United States, Western District of Tennessee.

A. R. PACE
vs.
THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY.

No. 106. Petition for Removal for Prejudice. Filed Mar. 21, 1891.

To the Hon. E. S. Hammond, judge, etc., presiding and holding said court:

Said Newport News and Mississippi Valley Company respectfully represents and shows to the court as follows:

That there is pending for trial and yet not tried a suit in the circuit court of Dyer county, Tennessee, at Dyersburg, in that State, wherein said A. R. Pace is the plaintiff and your petitioner, said Newport News and Mississippi Valley Company, is the defendant; that the amount involved in the said suit is the sum of fifty thousand dollars, exclusive of costs. Said suit was begun in said State circuit court on the — day of November, 1890, and has not yet been tried. Said A. R. Pace, the plaintiff in said suit, is now and ever has been and was at and before the commencement of said suit a citizen of the State of Tennessee, and your petitioner was at the
3 commencement of said suit and still is a citizen of the State of Connecticut, incorporated under the laws of that State, having its domicile at and in the city of ——, in that State, and the controversy in said suit is between your petitioner, a citizen of the State of Connecticut as aforesaid, and said A. R. Pace, a citizen of Tennessee aforesaid, and therein said Pace seeks to recover from your petitioner alleged damages for personal injuries said to have been received by him as a passenger on one of defendant's trains; that said A. R. Pace has, fraudulently and for the purpose of defeating your petitioner of its right of removal of said cause from the State to the Federal court on the ground of diverse citizenship, joined with your petitioner as codefendant with it The Chespeake, Ohio and Southwestern Railroad Company, a corporation organized under the laws of Tennessee,
4 suing both your petitioner and said Chesepeake, Ohio and Southwestern R. R. Co. as joint codefendants, having no cause of action whatever against that company and joining it in his writ as codefendant with your petitioner alone, for the purpose of preventing your petitioner from removing said cause on the ground of diverse citizenship, and the cause can be proceeded with and tried in your honor's said circuit court without the presence of said other defendant, The C., O. & S. W. R. R. Co. aforesaid, the alleged wrongs and injuries for which plaintiff sues having been suffered, if at all, while on board one of your petitioner's freight trains accompanying live stock in transit, shipped in his care, such carriage of plaintiff and his live stock being under contract with

your petitioner alone, and the alleged injury resulting from an accident in the State of Kentucky between that train and another one of petitioner's freight trains following it, the said C., O. & S. W. R. R. Co. not being concerned in any way
5 with the matter; that from and be-ause of prejudice or local influence your petitioner will not be able to obtain justice in said State circuit court or in any other State court to which it may under the laws of Tennessee have the right, on account of such prejudice or local influence, to remove said cause; and, besides, said Pace has, as petitioner is informed and believes, diligently canvassed the people of said county for the purpose of exciting a feeling of prejudice and hostility against petitioners and in his favor, and through his influence, etc., has succeeded in stirring up such prejudice until it has been general, because of which prejudice and local influence your petitioner, defendant as aforesaid, desires to remove the said suit into your honor's said circuit court for the eastern division of the western district of Tennessee, at Jackson, in pursuance of the act of Congress in that behalf provided, to wit, Revised Statutes of the United States,
6 section 639, subdivision 3, etc., and the act of Congress of March 2, 1887, amendatory of said sections of Revised Statutes, 4th clause of section 2, etc. Your petitioner files herewith, as exhibits to this petition, affidavits as required by the statute in such cases, which are made parts and parcels of this petition to all intents and purposes, and offers herewith a bond in the penal sum of $500.00 conditioned as by said acts of Congress required. Your petitioner prays that said bond may be accepted as good and sufficient according to said acts of Congress, and that said suit may be removed into your honor's said court according to the statutes in such cases made and provided, and that said State circuit court be required to stay further proceedings therein; and as ever bound, etc. A duly certified copy of the record of said suit from said State circuit court is herewith filed and made a part hereof.

HOLMES CUMMINS,
Attorney for Petitioner.

7 The matters stated in the foregoing petition are full and are believed to be true. I am attorney for petitioner.

HOLMES CUMMINS.

Sworn to and subscribed before me, M'ch, 1891.

JOHN B. CLOUGH, *Clerk.* [L. S.]

I have read the foregoing and hereto-attached petition for removal of the suit of A. R. Pace *v.* N. N. & M. V. Co. from Dyer circuit court to U. S. court at Jackson because of prejudice or local influence. I have been in Dyer and adjoining counties much of the time for several years past and in almost daily intercourse with those people and am of the opinion that there exists among those people such prejudice and local influence against said N. N. & M. V. Co. that it cannot obtain justice in this cause in any of said courts.

J. M. BROOKS.

Sworn to and subscribed before — this 14th day of March, 1891.
[SEAL.] HICK P. DOYLE,
Notary Public.

8 I have read the foregoing and hereto-attached petition for removal of the suit of A. R. Pace *v.* N. N. & M. V. Co. from Dyer circuit court to U. S. court at Jackson because of prejudice or local influence. I have been in Dyer and adjoining counties much of the time for several years past and in almost daily intercourse with those people and am of the opinion that there exists among those people such prejudice and local influence against said N. N. & M. V. Co. that it cannot obtain justice in this cause in any of said courts.

W. O. CHRISTIE.

Sworn to and subscribed before me this 16th day of March, 1891.
[SEAL.] HICK P. DOYLE, *N. P.*

I have read the foregoing and hereto-attached petition for removal of the suit of A. R. Pace *v.* N. N. & M. V. Co. from Dyer circuit court to U. S. court at Jackson because of prejudice or local influence. I have been in Dyer and adjoining counties much of the time for several years past and in almost daily intercourse
9 with those people and am of the opinion that there exists among those people such prejudice and local influence against said N. N. & M. V. Co. that it cannot obtain justice in this cause in any of said courts.

A. A. WILLIAMS.

Sworn to and subscribed before me this 16th day of March, 1891.
[SEAL.] HICK P. DOYLE, *N. P.*

I have read the foregoing and hereto-attached petition for removal of the suit of A. R. Pace *v.* N. N. & M. V. Co. from Dyer circuit court to U. S. court at Jackson because of prejudice or local influence. I have been in Dyer and adjacent counties much of the time for several years past and in almost daily intercourse with those people and am of the opinion that there exists among those people such prejudice and local influence against said N. N. & M. V. Co. that it cannot obtain justice in this cause in any of said courts.

W. A. RAGINNS.

Sworn to and subscribed before me this 16th day of March, 1891.
[L. S.] HICK P. DOYLE, *N. P.*

10 I have read the foregoing and hereto-attached petition for removal of the suit of A. R. Pace *v.* N. N. & M. V. Co. from Dyer circuit court to U. S. courts at Jackson because of prejudice or local influence. I have been in Dyer county for twenty-one years past and in almost daily intercourse with those people and am of the opinion that there exists among those people such prejudice and

local influence against said N. N. & M. V. Co. that it cannot obtain justice in this cause in any of said courts.

J. M. SHERROD.

Sworn to and subscribed before me this 16th day of March, 1891.

[L. S.] HICK P. DOYLE,
Notary Public.

I have read the foregoing and hereto-attached petition for removal of the suit of A. R. Pace *v.* N. N. & M. V. Co. from Dyer circuit court to U. S. court at Jackson because of prejudice or local influence. I have been in Dyer and adjoining counties much of the time
11 for several years past and in almost daily intercourse with those people and am of the opinion that there exists among those people such prejudice and local influence against said N. N. & M. V. Co. that it cannot obtain justice in this cause in any of said courts.

S. A. BROOKS.

Sworn to and subscribed before me this 16th day of March, 1891.

HICK P. DOYLE,
[SEAL.] *Notary Public.*

A. R. PACE } Pending in the Circuit Court of Dyer Co.,
v. } Tenn., and on Petition for Removal to
N. N. & M. V. Co. *et al.* } Federal Court.

In this matter Lewis M. Williams, being first duly sworn, says that he is fifty-nine (59) years of age and resides at Newbern, in said Dyer county, and has lived in said county for the past thirty (30) years; that affiant is acquainted with the plaintiff and resides within a quarter of a mile of his residence; that affiant has been acquainted with the drift of public sentiment among the
12 people of Dyer county for twenty (20) years past as concerns litigation with the line of road now owned by the defendant and has frequently been connected with such litigation as a witness, and sometimes summoned upon the jury when cases for the railroad Co. were for trial. Affiant has frequently heard people of that county talking about litigation with the defendant; has frequently heard jurors in cases they have tried or were trying against the defendant, and is satisfied that there exists in that community such a prejudice against the defendant as that a fair and impartial trial before a jury could not be had there. In numerous cases in the circuit court of that county the circuit judge has time and again and in more than one instance in the same case has set aside the verdicts of the jury against the railroad Co. on the ground of their being excessive. Affiant has heard jurors and others, residents of that county, in such numbers as
13 probably constitute and evidence the general public sentiment, speaking about the railroad and litigation with the railroad, almost universally antagonistic to the railroad Co. and in

favor of persons suing the railroad Co., in favor of giving them damages or allowing for them larger claims in excess of what the persons talking would deem right as between individuals, and evincing a disposition and a prejudice against the railroad Co. It is well known that these jurors do not deal with the railroad Co. as they do between individuals, and damages have been frequently assessed largely in excess of what would seem to be right as between individuals and in excess of what the parties themselves demanded. While affiant knows that the judge of that court is perfectly fair and impartial as between all litigants, whether corporations or individuals, yet this disposition is not found in the jury-box, and from this affiant is satisfied that a fair and impartial trial cannot
14 be had in that community by the defendant.

Affiant is also acquainted with the sentiment of people in the adjoining counties of Obion and Lauderdale to some extent, and, so far as he has knowledge or information, the same prejudice exists there against the defendant as that he has stated as existing in Dyer county. Affiant was at one time an agent of the defendant R. R. Co. for settling claims against it in that county, but is now and for some little time past has had no connection with the defendants in any way whatever.

LOUIS M. WILLIAMS.

Subscribed and sworn to before me this 7th March, A. D. 1891.
[SEAL.] S. J. SHEPHERD,
Notary Public.

A. R. PACE
v.
N. N. & M. V. Co.

John Echols, being duly sworn, says that he is vice-president and general manager of the Newport News and Mississippi Valley Company; that for the past ten years he has been frequently in the
15 counties of Dyer, Obion, Lauderdale, and adjoining counties in the State of Tennessee, and in frequent intercourse with the people resident in that neighborhood; that he has been familiar with the trial of many suits in several of those counties in which railroad companies were parties, especially where the Newport News and Mississippi Valley Company were interested, and acquainted with the way the people talk about litigation there against said company; that from his experience and observation he is satisfied that in this cause said railway company cannot obtain justice in said State circuit court of Dyer county nor in that of any other State court to which defendant under the laws of Tennessee may remove the cause on account of prejudice or local influence, and that because of prejudice or local influence existing in that community against said railway company. This is so bitter and so prevalent as that
16 evidence offered by petitioner is disregarded however much corroborated or even uncontradicted. Affiant further states that the facts set out in foregoing petition are true.

JNO. ECHOLS.

Sworn to and subscribed before me this 30th day of January, 1891.

[L. S.]

C. F. KREBS,
Notary Public, J. Co., Ky.

In the Circuit Court of Dyer Co., Tenn.

A. R. PACE
vs.
NEWPORT NEWS AND MISS. VALLEY CO.

J. G. Miller, being duly sworn, says that he is a practicing attorney-at-law and resides in the city of Paducah, State of Kentucky; that he is 38 years of age and has been practicing law in western Kentucky and western Tennessee for 12 years past; that since A. D. 1886 he has been in the employ of the Newport News and Miss. Valley Co. as one of its attorneys, and in the course of that employment has frequently attended the courts, both those of magistrates and the circuit courts of Dyer, Obion, Lauderdale, and
17 other counties in the State of Tennessee, and has been brought into frequent intercourse with many people resident in those counties; that he has attended the trial of many suits in these counties in which said N. N. & M. V. Co. was a party, and besides these matters has had charge of adjusting many claims held against that company by the people in these counties; that from this acquaintance with those people and his observations of the conduct and result of railroad litigation that he is satisfied that in this case the N. N. & M. V. Co. cannot obtain justice in said State circuit court of Dyer county in this cause nor in that of any other State court to which the defendant under the laws of Tennessee can remove the cause, and this because of prejudice or local influence which exists in and among those people against said railroad Co. This prejudice is general in that neighborhood, and so bitter and so preyalent as that justice is not given it, and
18 evidence offered by this defendant is disregarded, however much corroborated or even uncontradicted. Affiant has frequently heard Mr. H. Parks, the head attorney for plaintiff in this cause, say that it made no matter what the railroad Co. might prove, nor, indeed, whether it was contradicted or not, that the result of litigation would be against it because of this prejudice among the people of Dyer and adjoining counties. Mr. Parks has frequently spoken in affiant's presence of this unjust prejudice against this corporation, and has frequently stated that it could not obtain justice in the courts of Dyer county. Mr. Parks resided in that county up to about the year 1888 or 1889, and since that time has continued to practice at that bar. Similar statements to this affiant has heard from many other persons in that neighborhood, who were in every position to know just the state of public feeling, and these statements corroborate what affiant
19 has seen and knows of the result of litigation that this defendant has had. The affiant would, for explanation, further

say that he has not frequently been in actual attendance of trials of lawsuits in Lauderdale county, but has managed and adjusted money claims against the railway company mentioned in that county, as well as to attend to the preparation of cases, and is about as thoroughly acquainted with the feeling of the people in that as in the other counties mentioned, and says the foregoing statements are true. This March 7th, 1891.

JOHN G. MILLER.

Subscribed and sworn to before me by John G. Miller on this the 7th day of March, 1891.

Witness my hand and seal of office this day and date above mentioned.

[SEAL.] FORREST R. HIGGINS, *N. P.*

I have read the foregoing and hereto-attached petition for the removal of the suit of A. R. Pace *vs.* N. N. & M. V. Co. from Dyer
20 circuit court to U. S. court at Jackson because of prejudice or local influence. I am and have been a resident of Dyer county all my life and am a practicing physician and have been for eight years, residing all the time at Dyersburg, the county site of said county. While so practicing my profession I have been in almost daily intercourse with the people and have had opportunities to hear and have heard expressions and utterances of their sentiments and feelings and am of the opinion that there exists among the people such prejudice and local influence *vs.* The N. N. & M. V. Co. that it cannot obtain justice or an impartial trial in this cause in any of said courts. I am also of the opinion from my knowledge of public sentiment that the allegations and statements in said petition are true to the best of my belief.

J. P. C. WALKER, M. D.

Sworn to and subscribed before me March 11th, 1891.

[L. S.] HICK P. DOYLE,
N. P. for Dyer Co., Tenn.

21 I, M. J. Hart, for many years past a citizen and resident of Dyersburg and Dyer county, Tennessee, have read the foregoing and hereto-attached petition for removal of the suit of A. R. Pace *vs.* N. N. & M. V. Company from the Dyer circuit court to United States court at Jackson, Tennessee, because of prejudice or local influence. I have lived in Dyer county, Tennessee, for twenty years, and in my business and social relations I have mingled and come in contact with the people of Dyer and adjoining counties much of the time for several years past, and in my business have been in almost daily intercourse with those people, and I am of the opinion that there exists among these people such prejudice and local feeling and influence against the said N. N. & M. V. Co. that it cannot obtain justice in this cause in any of said courts, desiring to make this special reservation that this prejudice and influ-

ence does not attach itself to nor affect our circuit judge, T. J. Flippin.

22 M. J. HART.

Subscribed and sworn to before me March 13th, 1891.

[SEAL.] HICK P. DOYLE,
N. P. for Dyer Co., Tenn.

23 Circuit Court of the United States, Western District of Tennessee.

A. R. PACE
vs.
NEWPORT NEWS AND MISS. VALLEY CO. } No. 106. Removal Bond. Filed Mar. 21st, 1891.

The Newport News and Mississippi Valley Company and Holmes Cummins acknowledge themselves indebted to A. R. Pace in the sum of five hundred dollars, however on the following conditions, viz: Said Newport News and Mississippi Valley Company has petitioned the circuit court of the United States for the western district of Tennessee (eastern division, at Jackson) for the removal to that court of the certain cause or suit pending in the circuit court of Dyer county, State of Tennessee, wherein said A. R. Pace is plaintiff and said Newport News and Mississippi Valley Company and the Chesepeake, Ohio and Southwestern Railroad Company are defendants, upon the ground of unjust prejudice and local influence in said State court (as well as in the other State courts to which, under the law, said cause might be removed). Now, in case

24 said Newport News and Mississippi Valley Company pays all such costs and damages that may be adjudged against it by the court in the event of its being determined that said removal should not have been granted and abide by and perform the judgment of said United States circuit court in the premises, then this obligation is to be void and of no effect; otherwise to remain in full force and effect.

This 20th day of March, 1891.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY,
By its attorney, HOLMES CUMMINS.
HOLMES CUMMINS.

25 Circuit Court of the United States, Eastern Division, Western District of Tennessee, at Jackson.

A. R. PACE
vs.
THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY. } No. 106. Fiat and Order of Judge Jackson. Filed Mar. 21, 1891.

In this cause this day came the defendant, Newport News and Mississippi Valley Company, and presented its petition and affidavits, accompanied by proper bond, etc., praying the removal of this

cause from the circuit court of Dyer county for the State of Tennessee to the circuit court of the United States for the eastern division of the western district of Tennessee, at Jackson, on the ground of local influence and unjust prejudice, etc., when, it appearing to the court that from prejudice or local influence the petitioner will not be able to obtain justice in said State court or in any other State court to which said defendant (the petitioner) may under the laws of said State have the right on account of such prejudice or local influence to remove this cause, it is therefore ordered that this cause be, and the same is hereby, removed from the
26 said State court, the circuit court of Dyer county, State of Tennessee, to this court, the circuit court of the United States for the western district of Tennessee, eastern division, at Jackson, and the petitioner is ordered to file in this court a full and complete transcript of all the proceedings, files, and record of said State circuit court in this cause.

The bond of the petitioner filed with its petition herein is approved.

Approved March 20th, 1891.

HOWELL E. JACKSON,
Circuit Judge.

27 Circuit Court of the United States, Eastern Division, Western District of Tennessee.

A. R. PACE *vs.* NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY.	No. 106. Transcript from the Circuit Court of Dyer Co. Filed in the U. S. Cir. Ct. at Jackson, Tenn., March 21st, 1891.

State of Tennessee to the sheriff of Dyer county, Greeting:

You are hereby commanded to summon Chesepeake, Ohio and Southwestern R. R. Co. and Newport News and Mississippi Valley Company, if to be found in your county, to appear before the judge of our thirteenth judicial circuit at the next term of the circuit court to be held for the county of Dyer, at the court-house, in the town of Dyersburg, on the third Tuesday in November, 1891, to answer A. Rich Pace in an action to his damage fifty thousand dollars ($50,000). Herein fail not and make due return to this writ.

Witness T. C. Gordon, clerk of our said circuit court, at office in Dyersburg, this third Tuesday in July, A. D. 1891, and 115 year of American Independence.

T. C. GORDON, *Clerk.*

28 *Prosecution Bond.*

A. RICH PACE *vs.* C., O. & S. W. R. R. Co. and N. N. & M. V. Co.	Action of Damages in the Circuit Court of Dyer County, State of Tennessee.

We acknowledge ourselves to be indebted to the above-named defendant in the sum of two hundred and fifty dollars; to be void,

however, if the above-named plaintiff shall prosecute his above suit with effect or on failure thereof well and truly pay all such costs and damages as shall be awarded against him by the court having cognizance thereof.

Witness our hands and seals this 10th day of November, 1890.

A. RICH PACE, [SEAL.]
By HAMILTON PARKS, *Att'y.*
HAMILTON PARKS, *Security.* [SEAL.]

Return on Writ.

Executed in full as within commanded by summoning J. F. Pickett, agent for defendants, The Chesepeake, Ohio and Southwestern Railroad Company and The Newport News and Mis-
29–35 sissippi Valley Co., at Dyersburg, Dyer Co., Tennessee, on this the 12th day of November, 1890.

W. G. DYER, *Sheriff.*

* * * * * * *

36 In the Circuit Court of Dyer Co., Tenn., November Term, 1890.

A. R. PACE
vs.
CHESCPEAKE, OHIO AND SOUTHWESTERN R. R. Co. and NEWPORT NEWS AND MISSISSIPPI VALLEY CO.

In this cause the defendant Newport News and Mississippi Valley Company, respectfully petitioning the court, shows—

(1.) That the matter and amount in dispute in this cause, exclusive of costs, exceeds the sum or value of $2,000, and is, to wit, the sum of $50,000.00.

(2.) That this is a suit of a civil nature, of which the circuit courts of the United States have jurisdiction in a controversy
37 between citizens of different States, and that your petitioner at and before the commencement of this suit was and now still is a citizen of the State of Connecticut, United States of America, and that the said plaintiff, A. R. Pace, at and before the commencement of this suit was and still is a citizen of the State of Tennessee; that this controversy is wholly between your petitioner and the said plaintiff, citizens of different States, and can be fully determined as between them without the presence of the other defendant.

(3.) Your petitioner further shows that in deed the said Chesepeake, Ohio and Southwestern R. R. Co. is neither a necessary nor a proper party to this suit, and that the plaintiff has joined said railroad company as a defendant simply for the purpose of endeavoring thereby to defeat your petitioner's right of removal of this cause to the circuit court of the United States for this district,
38 and that the said course of the plaintiff is fraudulent and an unjust and illegal attempt to deprive said U. S. court of its

lawful jurisdiction, as well as is a fraud upon your petitioner's right to have this cause removed to and tried in the said U. S. circuit court.

(4.) That, as the plaintiff at and before his alleged injury well knew, the said defendant, C., O. & S. W. R. R. Co., did not own, operate, or control the railroad mentioned in the declaration, neither had he made any contract with that company for the transportation of cattle or himself, as alleged. Said line of railroad on and for years before the said 19th of September, 1890, as plaintiff well knew, was owned, operated, and controlled alone by your petitioner, the Newport News and Mississippi Valley Co., and plaintiff's said contract for carriage of cattle and himself was alone with that company, and the alleged injuries for which plaintiff sues were
39 inflicted, if suffered at all, by the engines, cars, and employees of your petitioner alone. Yet, notwithstanding that all this was and is well known to the plaintiff, he has joined said C., O. & S. W. R. R. Co. as defendant with your petitioner solely for the purpose of defeating your petitioner's right of removal of this cause to the Federal courts, so attempting to defraud your petitioner of his rights and defeat the right and justice, having no cause of action whatever against said C., O. & S. W. R. R. Co., and joining it as codefendant with your petitioner for the sole purpose of defrauding your petitioner of the right of removal of this cause to the Federal court.

(5.) That, as above stated, this controversy is alone between the plaintiff, a citizen of Tennessee, and your petitioner, a citizen of Connecticut, and the said C., O. & S. W. R. R. Co. is neither a proper or necessary party to this suit, and the issue herein can be fully determined between your petitioner and the plaintiff without
40 the presence of said other party.

(6.) Your petitioner offers herewith a bond, with good and sufficient surety, in the penalty required by law for entering in the said circuit court of the United States for the eastern division of the western district of Tennessee, at Jackson, on the first day of its next session thereof, a copy of the record in this suit and for paying all the costs that may be awarded by said circuit court if said court shall hold that this cause is wrongfully and improperly removed thereto.

Wherefore your petitioner prays this honorable court to proceed no further herein, excepting to make the order of removal required by law and to accept of said bond and surety in the case of the record herein to be removed to the said U. S. circuit court for the eastern division of the western district of Tennessee, at Jackson; and, as ever bound, &c.

DRAPER AND PARKS,
Att'ys for Petitioner.

41 STATE OF TENNESSEE, }
County of Dyer. }

W. S. Draper, being duly sworn, says that he is the agent and attorney of the petitioner, The Newport News and Mississippi Valley

Company; that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are full and are true.

W. S. DRAPER.

Subscribed and sworn to before me this 25th day of November, A. D. 1890.

T. C. GORDON, *Clerk.*

Filed November 25th, 1890.

T. C. GORDON, *Clerk.*

In Circuit Court of Dyer County, Tennessee, November Term, A. D. 1890.

A. R. PACE
vs.
THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY and Another.

Whereas in this cause the said defendants, The Newport News and Mississippi Valley Company, have petitioned the said court
42 for a removal of their cause to the circuit court of the United States for the western district of Tennessee, eastern division, at Jackson: Now, therefore, we acknowledge ourselves bounden to the said A. R. Pace in the sum of five hundred dollars; for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, and our representatives. This, however, is to be void on condition that said Newport News and Mississippi Valley Company shall, on or before the first day of the next term of the said United States circuit court, cause to be filed in that court a full and true transcript of the record, process, pleadings, files, papers, and proceedings of this cause and pay or cause to be paid all such costs as may be adjudged against it should it be determined that this cause was improperly or wrongfully removed to said United States circuit court; otherwise to remain in full force and virtue.

43 THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY,
By its attorney, W. S. DRAPER.
W. S. DRAPER, *Security.*

Acknowledged before me and approved by me Nov. 25th, 1890.

T. C. GORDON, *Clerk.*

Endorsed: A. R. Pace *vs.* Newport News and Mississippi Valley Company. Petition, affidavit, and bond for removal to U. S. court. Filed Nov. 25, 1890. T. C. Gordon, clerk.

Circuit Court of Dyer Co., Tenn., Nov'r Term, A. D. 1890.

A. R. PACE
vs.
CHESAPEAKE, OHIO AND SOUTHWESTERN R. R. Co. and NEWPORT NEWS AND MISSISSIPPI VALLEY CO.

In this cause the said defendant, C., O. & S. W. R. R. Co., in its own proper person comes and for plea to the plaintiff's declaration above says that J. F. Pickett, upon whom process was served as the agent of this company, is not now and was not at or since
44 & 45 the commencement of this suit nor at any time the agent or employee or in any manner connected with this defendant, and this matter the said defendant pleads in abatement of the plaintiff's action, and says that it is bound by said service on said Pickett to appear herein.

HOLMES CUMMINS,
Att'y for Defendant J. F. Pickett.

STATE OF TENNESSEE,
Dyer County.

J. F. Pickett, being duly sworn, says that the matters stated in the above plea are full, and that the same are true.

J. F. PICKETT.

Sworn to and subscribed before me this 25th day of November, 1890.

T. C. GORDON, *Clerk.*

HOLMES CUMMINS,
Att'y for said Co.

The plaintiff takes issue upon the above plea.

PARKS AND JOHNSTON,
Att'ys for Plaintiffs.

Filed Dec. 3, 1890.

T. C. GORDON, *Clerk.*

* * * * * * *

46 In Circuit Court of Dyer County, Tennessee, November Term, 1890.

A. R. PACE
v.
CHESAPEAKE, OHIO AND SOUTHWESTERN R. R. Co. and NEWPORT NEWS AND MISSISSIPPI VALLEY CO.

In this cause the plaintiff, A. R. Pace, comes, and, in answer to the petition of the defendant Newport News and Mississippi Valley Company, says plaintiff denies that this controversy is wholly between the defendant Newport News and Mississippi Valley Company and plaintiff, and denies that the controversy can be

fully determined as between them without the presence of the other defendant. He denies that the defendant Chesepeake, Ohio and Southwestern Railroad Company is neither a necessary nor a proper party to this suit, and denies that he has joined said Chesepeake, Ohio and Southwestern Railroad as a defendant simply for the purpose of endeavoring thereby
47 to defeat the petitioner's right of removal of this case to the circuit court of the United States for this district, and he denies that petitioner has any right of removal as claimed, and he denies that his cause is fraudulent and an unjust and illegal attempt to deprive said United States circuit court of its lawful jurisdiction, and denies that his cause is a fraud upon petitioner's right to have his claim removed to and tried in said United States circuit court. Plaintiff further denies that "at and before his alleged injury he well knew the said defendant, Chesepeake, Ohio and Southwestern Railroad Company, did not own, operate, or control the railroad mentioned in the declaration—neither had he made any contract with that company for the transportation of cattle and himself as alleged," but avers the contrary is true. He denies that the "said line of railroad on and for years before said 19th of
48 September, 1890, * * * was owned, operated, and controlled alone by petitioner," and on the contrary plaintiff avers that the defendant The Chesepeake, Ohio and Southwestern Railroad Company became the owner of said line of railroad in January, 1882, and that Collis P. Huntington and wife, Elizabeth S. Huntington; John Echols and wife, Mary H. Echols; Henry E. Huntington and wife, Mary A. Huntington, by their deed dated January 26th, 1882, sold and conveyed to the said Chesepeake, Ohio and Southwestern Railroad Company said railroad, which was then unfinished, but has since been finished by said defendant company, and has ever since been named and known as the Chesepeake, Ohio and Southwestern Railroad Company. The said deed was duly executed and acknowledged by the grantors, and was afterwards, in March, 1882, duly registered in the register's office of Dyer county, Tennessee, in Conveyance Book "V," pages 304 to 312, inclusive,
49 and a duly certified copy of said deed is filed herewith, marked Exhibit "A," and made a part of this answer, and plaintiff avers that said Chesepeake, Ohio and Southwestern Railroad Company has never sold nor has it ever conveyed said railroad to any person or corporation except to execute some mortgage on same, which mortgage has not been foreclosed, and while the Chesepeake, Ohio and Southwestern Railroad Company, a resident corporation, owns the road as above stated, and while the Newport News and Mississippi Valley Company claims in its petition that it owns, operates, and controls said railroad, yet plaintiff is informed and believes that both defendants operate and control said railroad, and that under the laws of this State that both defendants are jointly liable for the damages sustained by him on account of the injuries wrongfully inflicted upon him. Plaintiff denies that he has
50 no cause of action against the Chesepeake, Ohio and Southwestern Railroad Company, but he avers that he has a good

cause of action against both defendants, and that the Chesepeake, Ohio and Southwestern Railroad Company is both a necessary and a proper party to this suit, and he avers that he has in the utmost good faith brought this suit against both defendants, and that he has been guilty of no fraud whatever in bringing this suit, and that he verily believes that he is justly and legally entitled to recover a judgment against both defendants for the great injuries wrongfully inflicted upon him, as he has in his declaration alleged.

PARKS AND JOHNSTON,
Att'ys for Plaintiff.

STATE OF TENNESSEE, }
Dyer County. }

Personally appeared before me, T. C. Gordon, clerk of the circuit court of Dyer county, the plaintiff, A. R. Pace, and makes oath in due form of law that the statements and averments in the
51 foregoing answer are true to the best of his knowledge, information, and belief.

A. R. PACE.

Sworn to and subscribed before me December 3d, 1890.

T. G. GORDON, *Clerk.*

EXHIBIT "A" of Answer of A. R. Pace in Case of A. R. Pace *vs.* C., O. and S. W. R. R. Co. and N. N. and M. V. Co. in Circuit Court of Dyer County, Tennessee.

Collis Huntington
to
Chesepeake, Ohio and Southwestern Railroad Company. } (Deed.)

Rec'd March 27, 1882, at 11¼ o'clock a. m. Jno. T. Boon, register.

This indenture made this the twenty-sixth day of January, A. D. one thousand eight hundred and eighty-two, by and between Collis P. Huntington and Elizabeth S. Huntington, his wife, residents of the State and city of New York, John Echols, Mary Echols, his wife, residents of the State of Virginia, Henry E. Huntington and Mary A. Huntington, his wife, residents of Oneonta, State of New York, parties of the first part,
52 Chesepeake, Ohio and Southwestern Railroad Company, a corporation created, organized and existing under the laws of the States of Kentucky and Tennessee, party of the second part. Whereas the Memphis, Paducah and Northern Railroad Company, a corporation existing under the laws of the States of Kentucky and Tennessee, executed a mortgage or trust deed, conveying its entire railroad built and to be built, extending from the city of Paducah in the State of Kentucky to the city of Memphis in the State of Tennessee, together with its appurtenances and franchises and all of its property of every description acquired or to be acquired to Charles Joseph Conda and Josiah Austin Horsey as trustees, in

trust to secure the payments of the principal and interest of three thousand bonds of one thousand dollars each, or of so many of said bonds as should be issued under said mort-
53 gage, and two thousand, one hundred and fifty of such bonds were duly issued thereunder, to divers owners and holders thereof, and whereas default was afterward made in the payment of the interest accruing upon the said twenty-one hundred and fifty bonds, issued under the mortgage above referred to, according to the tenor and effect thereof, and such interest remained in default for more than thirty days. Whereupon the holders and owners of a majority of said bonds, authorized to be issued and issued as aforesaid, exercised the option to them on that behalf reserved in said mortgage or trust deed, and declared the whole principal money mentioned in and secured by whole of said bonds outstanding under the said mortgage or trust deed, together with the interest thereon, to be forthwith due and payable, although the period limited in said bonds for the payment thereof had not then expired, and duly notified the said Memphis,
54 Paducah and Northern Railroad Company, and the said trustees thereof, and whereas the said trustees declining to take such steps as were needed for a foreclosure of said mortgage or deed of trust, Abram Carl Werthelm and others, owners and holders of a majority of said outstanding bonds, residents of Amsterdam in the Kingdom of the Netherlands on behalf of themselves and all other holders of said bonds, instituted two suits in the circuit courts of the United States, one at Louisville in the district of Kentucky, and the other at Memphis in the western district of West Tennessee against said Memphis, Paducah and Northern Railroad Company said trustees and others to foreclose said mortgage, and whereas decrees were duly entered in the said foreclosure suits, and the mortgaged property was sold in one parcel and as an entirety under said decree on the 30th day of July A. D. 1881, and was foreclosed by the said Collis P. Huntington, John Echols,
55 and Henry E. Huntington, to whom all the said railroad and property and franchises have been duly conveyed by the said trustees, who were also appointed special master commissioners for that purpose by said courts and by the said Memphis, Paducah and Northern Railroad Company, as ordered and decreed by said courts in said causes, and whereas the said Collis P. Huntington, John Echols and Henry E. Huntington, as such purchasers, organized a corporation in the name of the Chesepeake, Ohio and Southwestern Railroad Company, under the laws of the said States of Tennessee and Kentucky, to own, operate, maintain and complete said railroad, and whereas said incorporation of the Chesepeake, Ohio and Southwestern Railroad Company so organized as aforesaid in the State of Tennessee, and *was* incorporated under and by virtue of the laws of that State, has been duly and lawfully consolidated with, and its stock and franchises amal-
56 gamated with those of the said Chesepeake, Ohio and Southwestern Railroad Company so organized as aforesaid in the State of Kentucky, and incorporated under and by virtue of the

laws of that State, such consolidation and amalgamation having been approved and directed to be so made by the unanimous vote of all of the stockholders of each and both of said companies: the name of said consolidated company being the Chesepeake, Ohio and Southwestern Railroad Company, and an act of the General Assembly of the Commonwealth of Kentucky having been passed, entitled "An act to incorporate the Chesepeake, Ohio and Southwestern Railroad Company" which was approved the eighteenth day of January 1882, and the said corporation having become a corporation of the State of Kentucky is one single and entire corporation in both States—and whereas
of the said Chesepeake, Ohio and Southwestern Railroad
57 Company has issued and delivered to said Collis P. Huntington, John Echols, and Henry E. Huntington thirty thousand shares of its capital stock of the par value of one hundred dollars each—all and every of which are fully paid up, making in all the sum of three million dollars, and the said company has also executed and delivered to the said Collis P. Huntington, John Echols and Henry E. Huntington, its obligation in writing to further execute and pay to them certain of its corporate bonds secured — a first mortgage upon all its properties, assets and franchises and certain other of its corporate bonds secured by a second mortgage upon all its properties, assets and franchises and certain other common and preferred stocks of said company—Now, therefore, this indenture witnesseth that in consideration of the premises and of the delivery to the said parties of the first part, of said thirty thousand shares of the capital stock of said company, party of the second part, of said
58 further agreement and contract of said second party to deliver and pay said first parties said certain bonds and common and preferred stock, the said parties of the first part have granted, bargained, sold, assigned, aliened, remised, released, conveyed, and confirmed and do hereby grant bargain, sell, assign, alien, remise, release, convey and confirm unto the said party of the second part, and its successors and assigns all and singular the rights, title, interest and estates of the said parties of the first part, into the properties, rights, privileges and franchises which were granted, assigned, and conveyed to the said Collis P. Huntington, John Echols and Henry E. Huntington by two certain deeds to them, one from said Charles Joseph Canda, Josia*l* Austin Horsey, as trustees and special master commissioners of date 5th of August, A. D. 1881, and the other from said Memphis, Paducah and Northern Railroad Company of date the ninth day of August A. D. 1881,
59 which said properties, rights and privileges and franchises are in said deeds described as follows: All of the said railroad of the said Memphis, Paducah and Northern Railroad Company, beginning at and in the city of Paducah, in the State of Kentucky and running from thence southerly the distance of one hundred and sixty-five miles (165 m.) or thereabouts, through the counties of McCracken, Graves, Fulton, and Hickman in the State of Kentucky, and the counties of Obion, Dyer, Lauderdale, Tipton and Shelby in the State of Tennessee, to the city of Memphis (now called

the taxing district of Shelby county) in the said county of Shelby, in the said State of Tennessee, together with the track or roadway thereof, as well as that part of said railroad constructed and completed at the date of said indenture of mortgage or deed of trust, or that part thereof constructed and completed, and that part unfinished and incomplete and all and singular the rights of way of said company, and the
60 land, real estate, leaseholds, easements and other rights and interests in or pertaining to lands, rails, tracks, side tracks, or sidings, bridges, buildings, fences, depots, station-houses, shops, warehouses, car-houses, engine-houses, machine shops, repair shops, and all other buildings, sections, structures, fixtures and appurtenances thereunto belonging, or in anywise appertaining whether owned and possessed at the date of said deed of trust or thereafter acquired by said company or then or thereafter belonging or appertaining to, or acquired, used or intended for use for the purpose of or in connection with the said railroad or the operation or maintenance thereof as well as inclusive of those lands lying in Shelby county, State of Tennessee, near to and just north of city of Memphis (taxing district) purchased for said company by its agent O. H. P. Piper, and assigned to the said company by the said Piper by his contract and bond for title therefor, which lands are bounded on
61 the west by Wolf river, on the north by the lands of Hesekiah Cobb's heirs, on the east by the Randolph road, on the south by the lands of R. C. Brinkley's heirs, and lying adjoining the Memphis water-works grounds, and also all and singular the locomotives, engines, tenders, cars, carriages, shop tools and machinery and all of the rolling stock, equipments and machinery and all the franchises, rights and privileges and all others, the corporate property real and personal of said railroad company, belonging or appertaining to said railroad, whether heretofore acquired and then held and owned, or thereafter acquired or to be acquired by the said railroad company, or at any time used or designed to be used, in or upon or in connection with said railroad, including all depots and warehouses and structures and all lands acquired or designed for depots, warehouses, structures and side tracks at either terminus or along the line of said railroad,
62 whether then held or owned or th-reafter acquired by the said railroad company, or for use in connection with said railroad, and all the property, rights, privileges and leaseholds granted the said company by the said taxing district of Shelby county, Tennessee, as contained in and shown by its contract with said company of date the 26th day of April A. D. 1881, and registered in the register's office of said Shelby county, in Book No. 137, pages 931 *et seq.*—and all continuations, branches, tracks or extensions of said railroads to such depots, warehouses, structures and otherwise and also all the rights, title and interest which the said Memphis, Paducah and Northern Railroad Co. then had or might thereafter acquire under and by virtue of any lease to it in and to any other railroad branching from or connecting with the said railroad of said company hereinbefore described

or in or to any other property real or personal, used or
63 to be used, — said railroad company in connection with its said railroad or with any railroad leased by it as aforesaid, and all and singular the rents, issues, tools, incomes, earnings and profits of the said railroad company and of its telegraph lines and of any railroad leased by it as aforesaid, and also the company telegraph lines, all the rights and things then and thereafter belonging to or appertaining to such telegraph lines and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well *as* in law as in equity of the said railroad company of, in and to the same, and every part and parcel thereof, with the appurtenances, and all the rights, privileges, immunities and franchises whatsoever, including the franchise to be a corporation which the said railroad company then possessed, owned or was entitled to, or thereafter became possessed of or entitled unto, and all of the said railroad company's right of re-
64 purchase or equity of redemption therein or thereto and also all of the estate, rights, titles, interest, dower, and right of dower, homestead, property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the second part or either of them in and to the above-described premises and every part and parcel thereof with the appurtenances—to have and to hold all and singular the above described, granted and bargained premises, property, rights and franchises with the appurtenances unto the said party of the second part, its successors and assignees forever. It is understood and agreed and is hereby declared that no warranty of title, or other covenant on the part of the parties of the first part hereto or either of them in respect to the premises herein described is in anywise implied and no such responsibility is assumed by the said parties of the first part or either of them.

65 In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

C. P. HUNTINGTON.	[L. S.]
ELIZABETH S. HUNTINGTON.	[L. S.]
JOHN ECHOLS.	[L. S.]
MARY H. ECHOLS.	[L. S.]
H. E. HUNTINGTON.	[L. S.]
MARY A. HUNTINGTON.	[L. S.]

Sealed and delivered in the presence of—the words "a corporation of the State of Kentucky" being interlined between the 12th & 13th line- on the 5th page before execution hereof—

CHAS. L. BEAUMAN,
As to C. P. H. and E. L. H.

The words and the southwestern interlined on 5th page, and the words "common and" interlined twice on 6th page before execution.

STATE OF NEW YORK, }
City and County of New York, } ss:

I, Charles Nettleton, a commissioner of the State of Kentucky for New York, residing in said city of New York, do certify that
66 the foregoing instrument from Collis P. Huntington and others to the Chesepeake, Ohio and Southwestern Railroad Company was this day produced to me by the said Collis P. Huntington and Elizabeth S., his wife, and acknowledged by the said Collis P. and Elizabeth S. Huntington to be their act and deed, and, the contents and effects of said instrument being explained to the said Elizabeth S. Huntington by me separately and apart from her husband, she thereupon declared that she did freely and voluntarily execute and deliver the same to be her act and deed and consented that the same might be recorded.

In witness whereof I have hereto set my hand and affixed my official seal this the 26th day of January, A. D. 1882.

[Seal of Commissioner.]

CHARLES NETTLETON,
Commissioner for Kentucky in New York,
117 *Broadway, New York City.*

STATE OF NEW YORK, }
City and County of New York. }

67 On this the 26th day of January, A. D. 1882, personally appeared before me, a commissioner for the State of Tennessee in and for the State of New York, residing in the city of New York, Collis P. Huntington and Elizabeth S. Huntington, his wife, the foregoing-named bargainors, with whom I am personally acquainted, who acknowledged that they executed the foregoing instrument for purposes therein contained; and the said Elizabeth S. Huntington, wife of the said Collis P. Huntington, having appeared before me separately and apart from her husband, the said Elizabeth S. Huntington acknowledged the due execution of the said instrument to have been done by her freely, voluntarily, and understandingly without compulsion or constraint from her husband for the purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal this 26th day of January, A. D. 1882.

[Seal of Commissioner.]

CHARLES NETTLETON,
Commissioner for Tennessee in New York,
117 *Broadway, N. Y. City.*

68 STATE OF TENNESSEE, }
Dyer County. }

Personally appeared before me, Zach. Watkins, county court clerk of said county, H. E. Huntington and Mary A. Huntington, his wife, bargainors in and to the foregoing deed, with both of whom I am *perfectly* acquainted, and who acknowledged the execution of

the foregoing deed for the purposes therein contained, and, the said Mary A. Huntington, wife of the said Henry E. Huntington, having also appeared before me privately and apart from her said husband, and the contents and effects of the said instrument being explained to the said Mary A. Huntington, she thereupon declared that she did freely, voluntarily, and understandingly execute and deliver the same to be her act and deed without any compulsion or constraint from her said husband and for the purposes therein contained and consented that the same might be recorded.

69 In witness whereof I have subscribed my hand, affixed the seal of the county court of said county, at office, in Dyersburg, Tennessee, on this the 6th day of February, 1882.

[SEAL.] ZACH. WATKINS,
Clerk of Dyer County Court.

STATE OF TENNESSEE, }
Dyer County. }

I, Hick P. Doyle, a notary public in and for said county and State, duly commissioned and qualified according to law, do certify that the instrument of writing from H. E. Huntington and wife and others to the Chesepeake, Ohio and Southwestern Railroad Company was this day produced to me by said H. E. Huntington and his wife aforesaid and was acknowledged by the said H. E. Huntington and Mary A. Huntington to be their act and deed; and the contents and effects of the said instrument being explained by me to the said Mary A. Huntington separately and apart from her husband, she thereupon declared that she did freely — volun-

70 tarily execute and deliver the same to be her act and deed, and consented that the same might be recorded.

In witness whereof I have hereunto set my hand and affixed my notarial seal, at office, in Dyersburg, on the 6th day of February, A. D. 1882.

H. P. DOYLE,
Notary Public for Dyer Co., Tenn.

STATE OF KENTUCKY, } *ss:*
County — Fayette, }

Before me, John T. Shelby, a notary public duly appointed and qualified within and for said county and State, this day personally appeared John Echols, grantor and bargainor in the foregoing deed, with whom I am personally acquainted and who acknowledged that he executed the foregoing deed for the purposes therein contained.

Witness my hand and seal of office this the 16th day of February, 1882.

[SEAL.] JOHN T. SHELBY,
Notary Public, Fayette County, Ky.

STATE OF KENTUCKY, *Fayette County,* } *ss:*

71 I, Allie G. Hunt, clerk of Fayette county court, do certify that the foregoing instrument of writing from Collis P. Huntington and Elizabeth Huntington, his wife; John Echols and Mary H. Echols, his wife, and Henry E. Huntington and Mary A. Huntington, his wife, was this day produced to me in my office and was acknowledged by the said John Echols to be his act and deed.

Given under my hand and seal of office this the 16th day of February, 1882.

[Seal of Fayette County, Ky.]

ALLIE G. HUNT, *Clerk.*

STATE OF VIRGINIA, *County of Augusta,* } *sct:*

I, William A. Burnett, a notary public — and for the said county of Augusta aforesaid and State of Virginia, duly commissioned and qualified according to law (commission date of the 16th day of February, 1881, and will expire on the 8th day of March, 1885), do certify that the instrument of writing from H. E. Huntington and wife and others to the Chesepeake, Ohio and Southwestern
72 Railroad Company was this day produced to me by Mary H. Echols, the wife of John Echols, and was acknowledged by the said Mary H. Echols to be her act and deed, and, the contents and effect of the said instrument being explained by me to the said Mary H. Echols separately and apart from her husband, she thereupon declared that she did freely and voluntarily execute and deliver the same to be her act and deed and consented that the same might be recorded.

In witness whereof I have hereunto set my hand and affixed the impress of my notarial seal, at Staunton, Virginia, on the 20th day of February, A. D. 1882.

WILLIAM A. BURNETT,
Notary Public, Augusta Co., Va.

STATE OF VIRGINIA, *Augusta County,* } *sct:*

Personally appeared before William A. Burnett, a notary public in and for said county of Augusta (duly commissioned and qualified according to law, commission dated February 16th, 1881,
73 and expiring March 8th, 1885), Mary H. Echols, wife of John Echols, bargainor in and to the foregoing deed, with whom I am personally acquainted and who acknowledged the execution of the foregoing deed for the purposes therein contained, and the said Mary H. Echols, wife of the said John Echols, — privately and apart from her said husband, and the contents and effects of said instrument being explained to the said Mary H. Echols, she thereupon — that she did freely, voluntarily, and understandingly execute and deliver the same to be her act and deed, without any com-

pulsion or restraint from her said husband, for the purposes therein contained, and consented that the same might be recorded.

In witness whereof I have subscribed my hand and affixed the impress of my notarial seal, at office in Staunton, Virginia, on the 20th day of February, A. D. 1882.

[SEAL.] WILLIAM A. BURNETT,
Notary Public, Augusta County, Virginia.

74 STATE OF TENNESSEE, }
Shelby County. }

The foregoing instruments, with certificates, was filed in my office for registration on the 21st day of March, 1882, at ten o'clock a. m., and noted in Note Book No. 10, page 19, and was recorded in Record Book No. 142, page 106.

F. R. HUNT, *Register.*

STATE OF TENNESSEE, }
Tipton County. }

REGISTER'S OFFICE, *March 25th*, 1882.

I, J. N. Harris, of said county, do certify that the foregoing instrument was filed in my office at 7.30 o'clock a. m. on the 25th day of March, 1882, and entered for registration in Entry Book C, page 64, and together with this and the foregoing certificates of probate, together with that of F. R. Hunt's certificate, is duly registered in Deed Book No. 30, page 264 *et seq.*

J. N. HARRIS, *Register.*

STATE OF TENNESSEE, }
Lauderdale County. }

I, J. D. Baxter, register of said county, certify that the forgoing instrument, with the foregoing certificates *endereon* thereon,
75 was presented for registration on the 25th day of March, 1882, at 4 o'clock p. m., and is so noted in my office in Note Book 4, page 51, and the same is duly registered in Book "S," pages 235 and 236.

Witness my hand, at office in Ripley, this the 25th day of March, 1882.

J. D. BAXTER, *Register.*

STATE OF TENNESSEE, }
Dyer County. }

I, J. T. Boon, register of said county, hereby certify that the foregoing instruments and certificates of probate *was* received for registration March 27th, 1882, at 11¼ o'clock a. m., and *is* so noted in Note Book, vol. 2, page 117, and with said certificates *and is* registered in Conveyance B. "V," page 304, etc.

Witness my hand, at office in Dyersburg, this the 27th of March, 1882.

J. T. BOON, *Register.*

STATE OF TENNESSEE, }
Dyer County. }

I, J. T. Boon, register of said county, hereby certify that the foregoing is a full, true, and perfect copy of a deed of conveyance from Collis P. Huntington *et als.* to the Chesepeake, Ohio and Southwestern Railroad Company, as appearing of record in Conveyance Book "V," on pages 304, 305, 306, 307, 308, 309, 310, 311, now on file in my office, in Dyersburg, this the 29th day of November, 1890.

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J. T. BOON, *Register.*

Caption Minutes November Term, 1890.

TUESDAY, *November 18th*, 1890.

STATE OF TENNESSEE, }
Dyer County. }

Be it remembered that a regular term of the circuit court was begun and held this day for the county of Dyer, at the court-house, in the town of Dyersburg, Tennessee, it being the 18th day of November, in the year of our Lord one thousand eight hundred and ninety, and the 115th year of American Independence. On account of the absence of his honor Judge Thos. J. Flippin, judge of the 13th judicial circuit (because of sickness in his family), the clerk proceeded to an election for special judge by the members of the bar present, and thereupon T. E. Richardson, having received a majority of the votes cast by the members of the bar present, who were residents of the State, was declared duly elected and was duly conducted into the office upon taking before the clerk an oath to support the Constitution of the United States and of the State of Tennessee, as well as the oath prescribed by statute for special judges; and thereupon the following proceedings were had, to wit:

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WEDNESDAY, *Dec'r 3d*, 1890.

Court met pursuant to adjournment—present and presiding, Hon. Thos. J. Flippin, judge of the 13th judicial circuit—when the following proceedings were had, to wit:

A. R. PAGE }
vs. }
N. N. & M. V. Co. }

On this day the defendant, Newport News and Mississippi Valley Company, presented to the court its petition to remove this case from this court to the United States circuit court for the eastern division of the western district of Tennessee, at Jackson, Tennessee, which petition was sworn to, and it tendered its bond for the removal of said suit, and this cause came on to be heard and was heard before the court upon the said petition, affidavit, bond and answer to the petition and upon the plaintiff's declaration filed herein, and, upon argument of counsel, the court

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is of opinion that said application for said removal should be disallowed and overruled. It is therefore ordered and adjudged by the court that the said petition and application be disallowed, and the same is hereby refused and disallowed; to which action of the court the defendant, Newport News and Mississippi Valley Company, excepts.

Clerk's Certificate.

STATE OF TENNESSEE, }
Dyer County. }

79 I, T. C. Gordon, clerk of the circuit court for Dyer county, Tennessee, hereby certify the foregoing to be a full, true, and correct copy of the summons, declaration, petition for removal, affidavit and bond, and the order of the court upon said petition for removal of said cause to the circuit court of the United States, as the same appears in the files and records of our circuit court.

Witness my hand and seal, at Dyersburg, Tennessee, this 12th day of March, 1891.

[SEAL.]

T. C. GORDON,
Circuit Court Clerk.

80 UNITED STATES OF AMERICA, }
Eastern Division of the Western District of Tennessee. }

In the Circuit Court of the United States within and for the Eastern Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its April term, A. D. 1891, at the United States courthouse, in the city of Jackson, in said district, on, to wit, the 4th day of May, A. D. 1891, in the following cause, to wit:

A. R. PACE, Plaintiff,
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY CO. and CHESAPEAKE, OHIO AND SOUTHWESTERN R. R. CO., Defendant-. } No. 106.

Came the parties, by their attorneys, when leave is given defendant The Chesepeake, Ohio, and Southwestern Railroad Company to withdraw its plea in abatement and file a plea of not guilty herein.

[Endorsed:] No. 106. Circuit court of the United States, eastern district of Tennessee. A. R. Pace *vs.* N. N. & M. V. Co. *et al.* Order of court. Entered and filed 4th day of May, A. D. 1891. John B. Clough, clerk, by —— ——, deputy.

81 Circuit Court of the United States, Eastern Division, Western District of Tennessee.

A. R. PACE *vs.* CHESEPEAKE, OHIO AND SOUTHWESTERN Railroad Company and Newport News and Mississippi Valley Company.	No. 106. Petition. 1891.	Answer to Petition. Filed May 5,

The answer of A. R. Pace to the petition of the Newport News and Mississippi Valley Company, filed in your honor's court March 21st, 1891.

To the Honorable E. S. Hammond, judge, etc., presiding and holding said court:

Plaintiff admits that there was pending for trial and not tried at the date said petition was filed a suit in the circuit court of Dyer county, Tennessee, wherein A. R. Pace was plaintiff and said petitioner, Newport News and Mississippi Valley Company, and The Chesepeake, Ohio and Southwestern Railroad Company were defendants, and he admits that the amount involved is correctly stated, and that said suit was begun in said State court in
82 November, 1890, and had not been tried at the time said petition was filed, but he says that said case could have been tried at the November term, 1890.

He admits that he is and always has been a citizen of the State of Tennessee, and that the petitioner was chartered by the State of Connecticut, and The Chesepeake, Ohio and Southwestern Railroad Company, the other defendant, is a citizen of the State of Tennessee, and he admits that his suit was brought to recover damages for personal injuries received by him as a passenger on defendant's train. He denies that he has fraudulently and for the purpose of defeating the petitioner's right of removal of said cause from the State to the Federal court on the ground of diverse citizenship joined with petitioner as a codefendant the Chesepeake, Ohio and Southwestern Railroad Company, and he denies that statement in the petition which says that he had no cause of action against
83 said company, and he states that he has a good cause of action against the Chesepeake, Ohio and Southwestern Railroad Company and against petitioner, and he states that the Chesepeake, Ohio and Southwestern Railroad Company is the owner of the railroad upon which he was hurt, and he denies that the Newport News and Mississippi Valley Company owns said railroad, and he denies that statement in the petition which says that the said Chesepeake, Ohio and Southwestern Railroad Company was not concerned in any way in the matter of his injury, and he states that both of the defendants are liable for the injury inflicted upon him. He denies that from and because of prejudice or local influence petitioner will not be able to obtain justice in said State

court of Dyer county or in any other State court to which it may under the laws of Tennessee have the right, on account of such prejudice or local influence, to remove said
84 *said* cause, and he denies that he has diligently canvassed the people of said county for the purpose of exciting a feeling of prejudice and hostility against petitioner and in his favor, and he states that he has done no such thing as is charged, and if petitioner was so informed and believed that said information was absolutely false and said belief was founded on false information. He states that defendant could have a fair and impartial trial in the circuit court of Dyer county. Petitioner files herewith an exact copy of the deed conveying to the Chesepeake, Ohio and Southwestern Railroad Company the said railroad on which he was traveling as a passenger when he was injured, and he states that said railroad company has never sold and conveyed said railroad to the petitioner, and he denies that it has ever made to the petitioner any legal or valid transfer or lease of said property. Petitioner is a Con-
85 necticut corporation and it does not own any railroad connecting with the line of the Chesepeake, Ohio and Southwestern railroad.

Plaintiff has no objection to trying this case in this honorable court, except that it will be very inconvenient for him to get his witnesses from Dyer county to attend this court, as it is on a different line of railroad from the road running through Dyer county, and he waives any right he may have to have this case remanded.

McCORRY AND BOND AND
HAMILTON PARKS,
Att'ys for Petitioner.

86 Circuit Court of the United States, Eastern Division, Western District of Tennessee.

A. R. PACE
v.
NEWPORT NEWS AND MISSISSIPPI VALLEY CO. } No. 106. Affidavit. Filed May 5, 1891.

In this cause Holmes Cummins, attorney for defendants, makes oath that defendant cannot go to trial at this term because of the absence of the following witnesses, viz., J. P. C. Walker, A. B. Hoskins, J. H. Hamilton, Guy Douglas, D. G. Murrell, H. C. Hamilton, and Jesse Pierce, each of whom, except said Murrell, have been duly subpœnaed to attend herein and testify at this term on defendant's behalf. Said witnesses and each of them are material to defendant's defence in this case, and it knows of no other person or persons by whom it can prove the same facts as it believes it can prove by them. Said Walker is, as defendant is informed, absent from the State and is temporarily at Washington, D. C., and said Guy Douglas is, as defendant is informed, absent from the State and is in Mississippi, and said J. H. Hamilton is, as defendant is
87 informed, detained at home by sickness in his family. Neither of said witnesses are absent by defendant's procure-

ment or consent. Said Murrell resides in Paducah, Kentucky, but would be here except that he is detained at Paducah under process from the common pleas court of McCracken county, Kentucky. Each other of said absent witnesses reside in Dyer county, in Tennessee, and defendants can have the benefit of the evidence of each of them at the next term if a continu*ous* can now be had. Said Murrell's deposition has already been taken herein on defendant's behalf, but subsequent thereto other matters not then known to defendant have arisen about which he was not examined, and his further examination is necessary. Defendants expect to prove by said Haskins and Walker that they are practicing physicians of many years' standing in Dyer county, Tennessee, the same in which plaintiff resides; that they have known plaintiff for many years, and that said Haskins has attended plaintiff as his medi-
88 cal attendant both for the injuries for which this action is brought and previously for other troubles and complaints; that, as affiant is informed, said witnesses will prove that plaintiff's injuries for which he sues are not permanent and are to a large degree feigned or simulated and not real; that on other occasions one or both said physicians have detected plaintiff making like simulated claim for or of injury; that these physicians visited plaintiff or saw him at divers times other than when he was examined by Drs. Rogers, Minor, Cowgill, and others (such joint examination being only one time), and can evidence other facts than those said Rogers and others have testified about in their depositions herein. Affiant knows of no other persons by whom the same matters can be proven as it expects and believes defendant can and will prove by said Haskins and Walker, and, as defendants are informed and believe, such evidence of said absent witnesses, Haskins and
89 Walker, is not merely cumulative, but is or will be of facts substantially other and different from those deposed about by said Rogers and others in the depositions filed herein.

HOLMES CUMMINS.

Sworn to and subscribed before me 5th day of May, 1891.

J. B. CLOUGH, *Clerk.*

90 UNITED STATES OF AMERICA,
Eastern Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Eastern Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its April term, A. D. 1891, at the United States court-house, in the city of Jackson, in said district, on, to wit, the 5th day of May, A. D. 1891, in the following cause, to wit:

A. R. PACE, Plaintiff,
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY CO. and CHESEPEAKE, OHIO AND SOUTHWESTERN R. R. CO., Defendant. } No. 106.

Came defendants and moved the court for a continuance of this case to the next term, which motion, upon argument and consideration, is hereby overruled.

[Endorsed:] No. 106. Circuit court of the United States, eastern district of Tennessee. A. R. Pace *vs.* N. N. & M. V. Co. *et al.* Order of court. Entered and filed 5th day of May, A. D. 1891. John B. Clough, clerk, by —— ——, deputy.

91 Circuit Court of the United States, Eastern Division, Western District of Tennessee.

A. R. PACE
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY. } No. 106. Plea of C., O. & S. W. R. R. Co. Filed May 5th, 1891.

In this cause, defendant Chesepeake, Ohio and Southwestern Railroad Company, having withdrawn its plea of abatement herein, now, by leave of court, comes and pleads not guilty of the wrongs and injuries set forth and claimed against it by the plaintiff in his declaration.

W. S. DRAPER,
HOLMES CUMMINS,
Att'ys for C., O. & S. W. R. R. Co.

Plaintiff joins issue on said plea.

PARKS & JOHNSON, *Att'ys.*

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 223.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY,

Plaintiff in Error,

against

A. R. PACE,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF FOR PLAINTIFF IN ERROR.

HOLMES CUMMINS,
MAXWELL EVARTS,
Of Counsel.

C. G. Burgoyne, Printer and Copyist, 49 Wall St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 223.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY,
Plaintiff in Error,

AGAINST

A. R. PACE,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement.

A. R. Pace, the plaintiff below, was a cattle drover and dealer in live stock. On the 19th day of September, 1890, he shipped at Obion, Tennessee, a station on the line of railroad belonging to the plaintiff in error, a carload of cattle to be carried to Louisville, Kentucky. He entered into a written contract with the plaintiff in error to pay it forty dollars as the cost of the transportation of his stock, which amount included the carriage of himself on the train with the

cattle to attend and care for the same (Rec., p. 6). The following night, while the train was passing over the road, it became uncoupled. Pace was in the caboose at the rear end of the train, which part of the train stopped not long after it became uncoupled, while the engine and forward cars ran ahead for sometime before the discovery of the mishap. Upon the return of the latter to the rear end of the train, they struck the cars in one of which was the defendant in error, and pushed them down the road a short distance. The plaintiff in error offered evidence at the time of the trial to show that the conductor and brakeman of the train on which Pace was riding warned him of the danger of his position and of the fact that another train was following them and might not be signalled in time to prevent a collision, and that he had better get off the train lest he should be killed. This evidence was contradicted by Pace (Rec., p. 8). Shortly thereafter a train, also going toward Louisville, ran into the train upon which Pace was traveling, and he was injured (Rec., p. 7). Soon after the accident the plaintiff below brought a suit for damages in the Circuit Court of Dyer County, Tennessee, against the Chesapeake, Ohio and Southwestern Railroad Company and the plaintiff in error. Thereafter, on application by the plaintiff in error to the Circuit Court of the United States for the Eastern Division of the Western District of Tennessee, the case was removed into said court under the "prejudice and local influence" clause of the removal act. No motion to remand the case to the State Court was ever made and not long after it had been brought into the United States Court the case was discontinued as to the defendant the Chesapeake, Ohio and Southwestern Railroad Company, leaving the present plaintiff in error the sole defendant.

Upon the trial of the case the plaintiff below recovered a verdict of eight thousand dollars. A motion was then made by the plaintiff in error for a new trial, which was denied. A writ of error from this court to

the United States Circuit Court for the Western District of Tennessee was then sued out for the reversal of the judgment entered upon said verdict.

Specification of Errors.

FIRST. It was error on the part of the trial Judge to permit the plaintiff, against the defendant's objection, to introduce evidence tending to show that he was a "moral, upright man, of good character for honor and integrity." No evidence had been offered by defendant tending to impeach the plaintiff's character and the evidence as to plaintiff's morality was objected to by the defendant as not competent in any respect, and as especially incompetent to show or to measure the damages of the plaintiff. This objection was overruled by the trial Judge and the evidence allowed to go to the jury, the Court saying "that this is a question that goes to the measure of damages, and may go to the jury for what it may be worth in estimation of the injury done" (Record, p. 7).

SECOND. It was error to allow the plaintiff, upon an objection by the defendant, to offer testimony to show that the plaintiff had a "reputation for honor and integrity and was a good business man," and to ask questions as to his "character for truth and veracity" the plaintiff's character not having been impeached in any way. The objection of the defendant was overruled by the Judge, who stated that the "evidence was not admitted to sustain plaintiff's character as a witness, but to show his qualities as a man in respect to the measure of damages" (Record, p. 7).

THIRD. The Court below erred in giving the following charge to the jury upon the question of damages, to which portion of the charge the defendant duly excepted (Rec., p. 10).

"In consideration of this question *of damages accru-*
" *ing to Mr. Pace's character*, it is quite easy for a jury
" or for anybody to be misled. Now, a railroad com-
" pany has no more right to kill a worthless vagabond,
" when accepted as a passenger, than to kill the Presi-
" dent of the United States. Its obligation is just the
" same to carry him safely, and his right to compensa-
" tion just the same; but you will see that, when you
" go to determine the amount of damages that has been
" inflicted upon one by such an injury, *his character is*
" *a very important element in it.* A man who is worth-
" less and never earns a dollar, but is a burden upon
" his family—a vagabond and a trifling, worthless fel-
" low—certainly is not worth as much as some man
" who is the opposite of all that—a worthy citizen, a
" good man, and a blessing to his family, a blessing to
" the community; and you have a right, in determining
" the question, *the question* of the amount of damages
" to look to the quality of the thing that has been in-
" jured, and for that reason proof has been admitted
" before you, so that you may know just what manner
" of man Mr. Pace is, and so that you may say how
" much his character and qualities as a man may be
" regarded in measuring these damages against the rail-
" road company for its negligence, if he has not con-
" tributed to it."

FOURTH. The trial Judge erred in admitting evidence on the part of the plaintiff against the objection of the defendant to show that "at the place of the collision the railroad track was rough with many low joints and rotten ties, and in very bad condition at the time of the wreck" (Record, pp. 7 and 8).

FIFTH. It was error to permit the wife of the plaintiff to testify, on her re direct examination, against the objection of the defendant as to the sufferings of her husband. On cross-examination of the plaintiff's wife, defendant asked her (Rec., p. 8):

"x-Quest. 15. How do you know that he (plaintiff) suffered greatly? Ans. Because he complained a great deal; didn't sleep any, and was very restless.

"x-Quest. 16. Do you know that he has suffered greatly with toothache and earache in the same way—that is, because he complained of it? Ans. I knew that he complained of his teeth and ear aching, and that he wanted to have them pulled out, and the doctor was afraid to pull them out. He was doctored for the toothache and earache."

Whereupon plaintiff, on re-examination, asked, and was answered as follows, notwithstanding defendant's objection:

"'Q. You were asked about how you know that your husband suffered from his said injuries, and you say that he complained of suffering. You may state when he made such complaint, and what kind of suffering he complained of, and whether or not he has been wakeful at night and has lost sleep on account of his suffering? A. He made complaint of suffering at Paducah and since he left Paducah up to the present. He complained last night of his back and hip hurting him, and of his face. This was after midnight. And after we had retired for the night he woke me up complaining and saying that he had not slept any for two or three hours. He has complained ever since we came home from Paducah, and all the time at Paducah, when he complained at all, which was nearly all the time, of his hip and back and his jaw-bones and his teeth and tongue and his eye. Before the accident occurred he always slept very soundly; since the accident, he has been very wakeful and restless at night.'"

SIXTH. The Court below erred in qualifying the request of the plaintiff in error in regard to the warning given to Pace by the conductor and brakeman of the train of going to sleep in the caboose while on the track, to which qualification the defendant then and there excepted.

The request to charge as asked for by the defendant and granted was as follows (Rec., p. 9):

"If you find from the proof that just previous to the "collision plaintiff was warned by the conductor and "brakeman of the danger of going to sleep or remaining "in the car in which he had been riding while it was "standing on the track, and if you further find that "plaintiff, after being so warned, then could have "escaped, such negligence then will bar him from such "recovery"; or if you find from the proof that plaintiff "was told by the conductor and brakeman of the "danger, and that he had time after such warning to "avoid the danger and neglected to do so, that would "prevent his recovery from the company."

The Court then qualified the defendant's request as follows:

"But if you find that after the train broke loose the "conductor came back and told the brakeman to go "back and flag and then told Pace the train was fol- "lowing and for fear of accident he had better watch "out for it, and if he saw it, to get out of the way, this "would not be such warning as would make plaintiff's "negligence contributory, unless he knew of the danger "in time to get out and avoid the injury; and in con- "sidering this you will consider that plaintiff had a "right to rely upon the rules being obeyed and all "proper precautions being taken to warn the approach- "ing train of the obstruction and delay, such as pru- "dence required the management to adopt, and he must "have been warned about the necessity for leaving the "caboose before negligence contributing to the injury "can be attributed to him. You must find not only "the fact that plaintiff was warned, but that the warn- "ing came to him in such words and under such cir- "cumstances, that a reasonable man, using ordinary "care for his own safety, could have avoided the danger; "if so, he cannot recover."

SEVENTH. It was error on the part of the trial Judge to charge the jury as follows:

"You cannot have any very satisfactory scale of "measurement to fix it (plaintiff's damages) by. It is "of such a character that no intelligent mind can find "anywhere any satisfactory fixed standard of judg-"ment." * * * "You look into its character and "extent of the injury, to its duration in point of time, "and in every way you can conceive from this proof "that Mr. Pace can be physically affected by the in-"jury received by him."

To this portion of the charge of the Court the defendant below duly excepted (Rec., p. 9).

Point I.

The plaintiff in a civil suit can, as a general rule, only give evidence of his good character in answer to impeaching evidence offered by the opposite party.

In the present case no evidence was introduced by the plaintiff in error in any way tending to impeach the character of the plaintiff below, and the only question raised by the first, second and third specifications of error is whether in an action to recover damages for personal injuries it is competent for the plaintiff to introduce evidence as to his morality, uprightness and good character for honor and integrity (Rec., p. 7) for the purpose of measuring and determining the amount of his damages.

There are no doubt certain classes of civil cases in which the character of one of the parties is the issue made by the pleadings, as in cases of slander and seduction. In such cases evidence as to the character of the plaintiff is admissible. In other cases of tort, however, it is well-settled law that no evidence can be given

by the plaintiff as to his character or reputation. In fact, it is a long-established rule that in an ordinary civil case neither party can introduce evidence as to the good or bad character of himself or of his opponent. The reason for this rule is apparent. It would, indeed, be singular if it should be held to be a principle of law that the amount of the damage which a man receives when he is negligently struck by an engine is to be determined by whether he is virtuous or wicked, honest or dishonest, kind or cruel. The theory of the law is that the person causing the injury must pay for the damage he has done, which includes, among other things, the physical and mental suffering which he has occasioned, and how can a jury say that a broken arm does not pain the unrighteous man as much as it hurts the saint, or that the dishonest man does not undergo as much mental suffering from an injury to his person, as the man famous for his integrity and honor.

The chief grounds upon which the doctrine that evidence as to character is not admissible in a civil suit are that every man is supposed to have a good character until the contrary is proved; that if a man of good character is entitled to greater damages by reason of his morality, then a man of bad character should have his damages diminished by reason of his bad character, and as his wickedness increases, so his damages decrease, until a point is reached when no damages for an injury can be recovered because of the depth of the wickedness of the plaintiff, and we come to the position that a man may injure another with impunity if he only selects a sufficiently immoral victim. Another most important consideration is that the question of character in a case like the present is a purely collateral matter, not raised in any way by the pleadings, and the opposite party cannot be prepared to meet and rebut the evidence offered as to character. In the case at bar it was, of course, a complete surprise to the plaintiff in error when Pace offered this evidence as to his great moral worth, and it was in no position in the midst of

the trial to produce evidence to show that Pace was a rascal, as it is not impossible the railroad company might have proved if it had had an opportunity to do so. It is obvious that, in addition to these reasons, it would be unwise to admit such evidence in such a suit for the reason that civil cases would become endless affairs, in which the exertions of counsel would be chiefly directed to destroying the character of their opponent and to exalting the morality of their client, and the true issue in the case would be lost sight of.

The rule governing this question and the reasons for the same are well stated in 1 Whart. on Evidence, § 50, as follows :

"It would be manifestly improper to permit a party suing for damages to put in evidence, as reason why he should have heavy damages, that his character is good. First, the law assumes all characters to be good, and there is no use in proving that which is thus assumed; secondly, to make good character the basis of recovery would be equivalent to saying that a person with a bad character can be injured with impunity; thirdly, a collateral issue would be provoked which would bear hard upon many deserving cases. For these and other reasons the Courts have refused to permit such evidence to be put in."

All the elements of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation were stated by Chief-Justice COCKBURN in Phillips vs. Southwestern Railway Co., L. R., 4 Q. B. Div., 406. The Court in that case were of opinion that a new trial should be ordered upon the ground that the damages ($35,000) awarded the plaintiff were not sufficient, and seemed to think that some one of the many points which the jury should have considered in estimating the damage to the plaintiff had been overlooked by them, and Chief-Justice COCKBURN was therefore careful to state every element which, in his opinion the jury

were properly entitled to consider in determining the damages in such a case as follows :

"These are the bodily injury sustained, the pain undergone, the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to affect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business, as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life."

The Phillips case was cited with approval by this Court in Vicksburg, etc., Railroad Co. vs. Putnam, 118 U. S., 545, 554, and the principle upon which the damages should be measured in a personal injury case was there declared by Mr. Justice GRAY as follows :

"In an action for a personal injury the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession and has been deprived of the capacity of earning by the wrongful act of the defendant."

The cases just cited state in detail all that the jury have a right to consider in determining the amount of damages received by a plaintiff who has been injured through the negligence of another, and no mention is made as to the character of the plaintiff being a proper subject for the jury to consider in estimating his damages. The inference therefore to be drawn from these decisions is that such evidence is not admissible, and it was so held in the case of Johnson vs. Wells, Fargo & Co., 6 Nev., 224, where the plaintiff sued the defendant for damages caused by an injury received by reason of the negligence of the defendant, a common carrier.

Upon the trial of the case the Court charged the jury as follows (p. 230):

"In estimating damages the jury should take into consideration the bodily suffering of the plaintiff, his pain of mind, *his character*, etc."

On appeal it was held by the Court that "in an action against a passenger carrier for personal injuries caused by negligence, the character of plaintiff cannot be considered as an element of calculation, in estimating the amount of damages; and an instruction submitting it to the jury for such purpose is error" (*Syllabus*).

The converse of the proposition which we are now considering has been many times decided, and it seems to be well-settled law that in cases for damages for assault and battery evidence of the bad character of the plaintiff cannot be introduced upon the trial.

In Corning vs. Corning, 6 N. Y., 97, evidence offered by the defendant as to the bad character of the plaintiff was held incompetent. The action was brought to recover damages for an assault and battery, and the Court said at page 104:

"The damages sustained by the plaintiff could not be mitigated by evidence that she was dissolute in her conduct. She was entitled to the same measure of damages for the trespass as she would have been if she had sustained a good character for virtue."

Bruce vs. Priest, 5 Allen, 100, was an action brought by the plaintiff to recover damages for an assault and battery. Upon the trial the defendant was permitted under objection to introduce evidence to show that the general reputation of the plaintiff for *moral worth and integrity* was bad. The jury returned a verdict for the plaintiff, with $73 damages, and he alleged exceptions to the admission of the evidence as to his moral worth and integrity, which exceptions, on appeal, were sustained. Judge BIGELOW said at page 102:

"The character of the parties is in no way concerned in the nature of the action. It is wholly a collateral

matter, and if introduced would raise a false issue, entirely aside from the merits of the case. * * * He [a plaintiff] may forfeit the good opinion of his fellow men and become an object of pity and contempt by reason of his evil habits and associations and want of moral worth; but we know of no principle of law or ethics on which for such a cause impunity is to be granted to those who inflict injuries upon another, or full indemnity is to be denied to a party for a violation of the sanctity of his person."

As was said in McKenzie vs. Allen, 3 Strobh., (S. C., Law Rep.) 546, 547:

"It is a well-settled rule that, as evidence is to be confined to the point in issue, the character of either party cannot be inquired into, in a civil suit, unless it is put in issue by the nature of the proceeding itself. In actions for slander and seduction, it is so put in issue, and in some cases where the question is one of mere property, the character of one of the parties may be directly involved in the issue, *and then only may it be the subject of evidence.*"

In Hardy vs. Minneapolis & St. L. Ry. Co., 36 Fed. Rep., 657, the plaintiff brought an action as administratrix to recover damages for the negligent killing of her intestate, and recovered a verdict. The defendant moved for a new trial, and raised, among others, the point that upon the trial certain depositions attacking the reputation of the plaintiff had been excluded. The motion was denied, the Court saying upon this question at page 660 (Mr. Justice BREWER concurred in this conclusion):

"This evidence, if admitted, could only affect the amount of recovery, and it seemed to the Court upon the trial that it was immaterial. In cases of this character, where the damages are limited to the pecuniary loss of the next of kin, caused by the death of the relative, is it permissible, in order to increase or diminish the amount of the damages, for either party to prove that the next of kin are possessed

of a high character, or the contrary? If it be true that a poor reputation should diminish the damages, then a good reputation should increase the same. Yet this cannot be true. There may be cases presenting peculiar features in which such evidence might be competent, but in a case like the present the introduction of such evidence would not enlighten the jury upon the question of loss, caused by the death of the son and brother, but it would introduce an issue which would, unless it was clearly sustained and might even then tend to prejudice the jury against the defendants, and lead to the rendition of larger verdicts than would otherwise be given. The motion for new trial is therefore overruled."

Judge DEADY stated the same rule in Boyle vs. Case, 18 Fed. Rep. 880, 882, a personal injury case, as follows:

"In estimating compensatory damages in this case you will endeavor to reach a fair and just conclusion * * *

"Nor should these damages be diminished, so far as the physical pain and mental anguish are concerned, by the fact that the plaintiff is an obscure man in the lower walks of life—that he is a bartender, a professional gambler, or even a vagrant. The physical pain and mental anguish, which you find from the evidence the plaintiff suffered from the whipping and the attendant circumstances, you ought, by your verdict, to compensate him for, irrespective of his calling or condition in life."

See, also,

Fowler vs. Ætna Fire Ins. Co., 6 Cow., 673.
Gough vs. St. John, 16 Wend., 646.
Pratt vs. Andrews, 4 Comst., 493.
Dain vs. Wyckoff, 18 N. Y., 45.

It is difficult to see how a man's character and reputation can be injured because he has been unfortunate enough to be the victim of a railroad accident. There is nothing immoral or disgraceful in his misfortune, nor any reason to suppose that he would

be held in less esteem for his honesty and veracity after the accident than he was before it occurred. In other words, a man's reputation can be injured only from within himself. It is what he himself says and does which determines whether his reputation is good or bad, and not the accidents which may injure him physically. In short, the moral nature of a man is so distinct from his physical body that it is almost impossible to conceive how an injury to the latter must necessarily injure the former.

The trial Judge, however, in his charge to the jury apparently proceeded on the theory that the character of Pace had been injured by this accident. He begins this portion of his instructions with these words: "In consideration of this question of damages accruing to Mr. Pace's character." He then goes on as follows: "You will see that, when you go to determine the amount of damages that has been inflicted upon one by such an injury, his character is a very important element in it" (Rec., p. 10). If Pace had alleged in his pleadings damage to his character by reason of this injury, something perhaps might be said in support of this part of the charge. He has not done so, and it is not easy to see how Pace's character for morality, honor, veracity and integrity is affected in any way by the accident. No person, in his dealings with Pace, would disbelieve what he said or distrust him because he had been run into by an engine. In other words, a man's character cannot be taken away or injured by crippling or disfiguring his body.

This question was considered in Smithwick vs. Ward, 7 Jones L. Rep. (N. C.), 64, 66, and it was there said: "In the action for assault and battery the character of the plaintiff is not in issue. To be beaten does not *per se* operate any loss of character to the injured party. Such loss must result from his own misconduct, and hence damages are never given to compensate for such loss."

Even in cases involving questions of fraud and the

good faith of the plaintiff in certain transactions involved in the suit, it is not admissible to introduce evidence as to the morality of the plaintiff, and such evidence was excluded in the case of Simpson vs. Westenberger, 15 Cent. L. J., 428, where it was held that:

"Evidence of good character and reputation for honesty and fair dealing is not admissible on the part of a plaintiff claiming possession as mortgagee of personal property under a chattel mortgage held by him in an action of replevin, brought by the plaintiff against an officer to recover the possession of property levied upon in attachment proceedings against the mortgagor, when the mortgage is assailed as fraudulent, as against the creditors of the mortgagor."

The principal English case upon this point is Cornwall vs. Richardson, Ryan & Moody's Rep., 305. This was an action of slander for imputing felony, with a count for maliciously charging the plaintiff with theft before a Justice. The defendant pleaded the general issue and also a plea in justification of the slander, averring that the charge of felony was true. Upon the trial of the case the plaintiff's attorney, previous to closing his case, proposed to call witnesses to give evidence of the general good character of the plaintiff for honesty. The trial Judge "interposed and stated that he was not aware that in any case like the present the plaintiff had been allowed to go into evidence of his general character for honesty. That if such evidence was to be admitted on the part of the plaintiff, then the defendant must be allowed to go into evidence to prove that the plaintiff was a man of bad character."

The plaintiff in Jones vs. Stevens, 11 Price, 235, brought an action for a libel against him, tending to injure his credit and reputation in his profession and business of an attorney. General evidence of the plaintiff's bad character and ill-repute in his business was excluded upon the trial and the ruling was sustained on appeal. The opinions of the Judges on

appeal were chiefly based upon the ground that the plaintiff was unprepared to rebut such testimony.

Baron RICHARDS said, at page 265:

"It would be impossible for any man to come prepared to meet such a charge. Witnesses may be brought to answer the immediate purpose of the day, and to prove an answer to particular allegations; but is a plaintiff, on such an occasion as this, to come to the trial of his cause surrounded by a host of friends and acquaintances, consisting of all persons who may ever happen to have known anything of him, and to bring them from Staffordshire for such a purpose, and in a case where no such issue was taken? Such a notion is quite absurd and inconsistent with all the principles of English law."

Baron GRAHAM, at page 269, said:

"On the present occasion there is a full concurrence of opinion amongst the whole Court that such general evidence of bad character * * * is not admissible, and that, principally, on the grounds that a party cannot be expected to be prepared to rebut it: * * *"

In admitting this evidence and in charging the jury in regard thereto, the Court expressly told them that it was admitted as a measure of the damage the plaintiff had suffered, and that they had a right, in estimating the damages, to consider that the plaintiff was a "worthy citizen, a good man, and a blessing to his family; a blessing to the community." The verdict recovered by the plaintiff was $8,000 (a large verdict to give a cattle drover), and it would seem clear, from the size of the verdict, that the admission of the evidence of the plaintiff's character, and the charge of the Judge as to such evidence, had some influence with the jury in determining the amount of the damages awarded by them to the plaintiff.

POINT II.

Evidence on the part of the plaintiff to show "that at the place of the collision the railroad track was rough, with many low joints and rotten ties, and in very bad condition at the time of the wreck," was inadmissible.

The direct cause of the collision was that one train of the plaintiff in error undertook to pass another of its trains upon the same track. The condition of the track had nothing to do with the accident, and the resulting catastrophe would have happened if the road bed had been perfect and the track smooth and even, with proper joints and sound ties.

It is to be observed that the collision did not occur at the place where the cattle train became uncoupled. The cars becoming uncoupled while in motion, the rear end of the train continued on its course for some time before it came to a stop, and the collision occurred within a short distance of where it came to a standstill. Now, evidence as to the condition of the roadbed at the place where the separation of Pace's train occurred might very well have been admitted, as tending to show that the uncoupling was occasioned by the roughness of the track, but testimony as to the condition of the track, a mile or more from the place where the separation of the cars happened, is clearly not proper. There were really but two facts which caused this collision: First, the uncoupling of the cattle train, causing it to come to a stop. Second, the want of proper precaution in flagging the approaching train. Any evidence, which would in any way tend to show that either of these two facts were the result of negligence on the part of defendant, should not be excluded, but no evidence of negligence can be properly admitted

which does not tend to show that the railroad company was responsible for the uncoupling of the first train or for the want of care in flagging the second train, but simply shows that the defendant was careless in regard to certain details of its business, which were not the cause of and had no relation to the negligence which caused the accident. It would be quite as proper to show the condition of the track at Louisville, as at the place of the collision. One had as much to do with the accident as the other. If evidence of negligence is not to be confined to the immediate case before the Court, it would then seem that in a personal injury case testimony offered by the plaintiff to show the number and nature of the accidents which had happened on the railroad of a defendant for ten years prior to the accident could not be excluded, and that the jury should be left to infer from such evidence that the defendant must have been negligent in the case before them, because so many accidents had happened on its line of road. Such evidence would of course not be permitted to be introduced in any court, as it would only tend to show that the defendant had been generally negligent, and it would seem that in the case at bar the testimony as to the condition of the track at the place of the collision should have been excluded, as it had no relation whatever to the accident and could only tend to prejudice the minds of the jurors against the plaintiff in error, as showing it negligent in certain respects foreign to the causes of the accident, or, in other words, generally negligent.

POINT III.

Declarations of Pace to his wife, as to his sufferings, made after the accident and upon the night before the day his wife testified at the trial were not proper evidence.

Statements made by a party to an action to a witness therein are of course hearsay evidence, and cannot be received in evidence. The question presented here is whether the facts before us show any reason for an exception to this general rule, which is based upon the principle that the best evidence of a fact must always be produced, and it would seem that the plaintiff himself could have given the best evidence as to his suffering.

The plaintiff was alive and examined at the trial, being of course the principal witness in his own behalf. His wife went upon the witness stand and told in narrative form of her husband having complained to her that he was suffering pain. Almost all her story was confined to what her husband said the night before she was examined.

It would seem that such evidence can hardly be admitted upon the ground that it is part of the *res gestæ*. The accident was in September, 1890, and the trial in April, 1891. The wife of Pace was not present at the time of the accident. It is also inadmissible even as part of the *res gestæ* for the reason that there is no specific statement on the part of the witness as to what her husband said, but merely a general narrative as to his having complained of suffering in different parts of his body from the time she saw him after the accident happened up to the moment of her going into the witness box.

In Roche vs. Brooklyn City and Newtown R. R. Co., 105 N. Y., 294, the plaintiff brought an action to recover for personal injuries received while a passenger on one of defendant's cars. The plaintiff was present at the trial of the case and proved the injury and pain.

The testimony of "a third party that the plaintiff some days after the happening of the accident which caused her injury complained that she was suffering pain in her injured arm," was received in evidence. The plaintiff recovered a verdict, but on appeal the judgment entered upon the verdict was reversed upon the sole ground that the evidence of the third party as to the declarations of the plaintiff was hearsay evidence and should have been excluded. The Court said at page 298:

"Evidence of simple declarations of a party made some time after the injury and not to a physician for the purpose of being attended to professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration and of a most dangerous tendency, while the former necessity for its admission has wholly ceased.

"As is said by Judge ALLEN in Reed vs. N. Y. C. R. R. Co., 45 N. Y., 574, the necessity for giving such declarations in evidence where the party is living and can be sworn no longer existing, and that being the reason for its admission; the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should also cease. * * * The party can himself be a witness, if living; and, if dead, the suffering is of no moment, as it cannot be compensated for in an action by the personal representative under the statute. * * * But we are quite clear that the bald statement made long after the injury by the party that he suffers from pain ought not to be admitted as in any degree corroborative of his testimony as to the extent of his pain.

"For these reasons the evidence of Mr. McElroy as to the plaintiff's declarations of existing pain when they were walking in the street together long after the accident should not have been received."

The case just cited appears to state correctly the

rule, and seems to be the only one in the books which is on all fours with the case at bar.

The case of Insurance Company vs. Mosley, 8 Wall., 397, is not in conflict with the position of the plaintiff in error here, for the reason that in the Mosley case the party making the declarations was dead, while in the case at bar he was examined at the trial and perfectly able to prove his own suffering. The declarations testified to in the Mosley case were all made by the deceased very shortly after the accident which caused his death, and might very properly have been admitted, as they were, on the ground that they were part of the *res gestæ*. It is also to be noticed that they were specific declarations, the witnesses testifying as to what the deceased said, and the Court taking especial care to point out at page 405 that "anything in the nature of narration must be excluded."

Of course no point can be made of the fact that the plaintiff in error on cross-examination asked Pace's wife certain questions as to how she knew that plaintiff suffered greatly, and she replied, "because he complained a great deal." The defendant did not, by such a line of cross-examination, open the door to further examination by the plaintiff on this point. All that the plaintiff in error did was to ask the witness these questions for the purpose of ascertaining if she had any ground for her statement other than hearsay evidence. It appearing by her answers that she knew nothing about what she had testified to except from certain hearsay evidence, which was inadmissible, then, of course, the plaintiff had no right, by reason of the questions of the defendant, to introduce on re-direct examination the hearsay evidence the witness had referred to on her cross-examination.

POINT IV.

The plaintiff in error was entitled to the instruction asked for by it in regard to the question of contributory negligence of Pace, without any qualification whatever.

There was evidence in the case to show that the conductor and brakeman of the cattle train at the time the same became uncoupled warned Pace of the danger of his position, told him that a train was following them, and advised him that safety required that he should get off the cars, lest he be killed (Rec., p. 8). The plaintiff denied the truth of this testimony. Now, if the jury believed the statements of the conductor and brakeman, it would seem that the plaintiff was clearly guilty of contributory negligence, and that the charge requested by the railroad company to that effect should have been given without any qualification.

The mere fact that his train had broken in two, and that his car was standing on the track in the night away from any station was of itself sufficient notice of danger to any man of reasonable intelligence. In addition to this, however, we have here a distinct warning to Pace from both the conductor and brakeman of his train, given in ample time, which advised him of the danger of his position, and that safety required him to get off the car.

If the requests on this point asked for by the plaintiff in error, and given by the Court, were correct, then it was error in the trial Judge to limit and qualify them by instructing the jury that Pace, notwithstanding the warning, had a right to rely on proper flagging, etc., and that the warning must have been in such plain terms as to impress Pace with the "necessity" of then leaving the caboose to save himself, and that it was not enough "that plaintiff was warned."

It is hardly possible to conceive of a situation more

likely to impress upon the plaintiff the danger of his position. It was dark, his train was standing still away from a station and another train was right behind him. If, in such a situation a disregard of the common words of warning from the employees of the road that he will get killed, if he stays where he is, is not sufficient to make one guilty of contributory negligence, then it would seem that passengers are relieved of all care of self, need not heed any word of advice or warning of danger unless so positive and unmistakeable that he that heard, though a fool, would understand. It is not to be forgtten in considering this point that Pace was not traveling on a passenger train, but was on a freight train as an attendant of his cattle, and that the only duty towards him of the plaintiff in error was to run its freight trains in the ordinary way, and that it did not assume the higher grade of care imposed upon the carriers of passengers upon a passenger train.

POINT V.

It was error on the part of the trial Judge to charge the jury on the question of damages as follows: "If, however, gentlemen, you find no contributory neglect under these instructions, then the only question for you to consider is the amount of damages to award the plaintiff. * * * You cannot have any very satisfactory standard of measurement to fix it by. It is of such a character that no intelligent mind can find anywhere any satisfactory fixed standard of judgment. * * * You look into the character and extent of the injury and as to its duration in point of time, and *in every way you can conceive* from this proof that Mr. Pace can be physically affected by the injury received by him" (Rec., pp. 9, 12, 13).

We have seen that the proper elements of damage in the case of injury by the wrongful act of another are those stated by this Court in Vicksburg, etc., Railroad Co. vs. Putnam, 118 U. S., 546, 554, which we have referred to in the first point of this brief, but the Court below did not limit the guessing match on which it launched the jury to the value of the pain and suffering or the mental anguish caused Pace by his physical injuries ; but rather without once directing the jury as to loss of time, impairment of ability to earn money, expenses of medical attention, etc., which items are susceptible of measurement in dollars and cents with somewhat of accuracy, permitted them to speculate as to every element "*they could conceive of.*" While pain and suffering of the body as well as mental anguish may be impossible of accurate valuation, no one can maintain that impairment of working capacity or lost time or expenses incurred can not be ascertained in dollars and cents.

POINT VI.

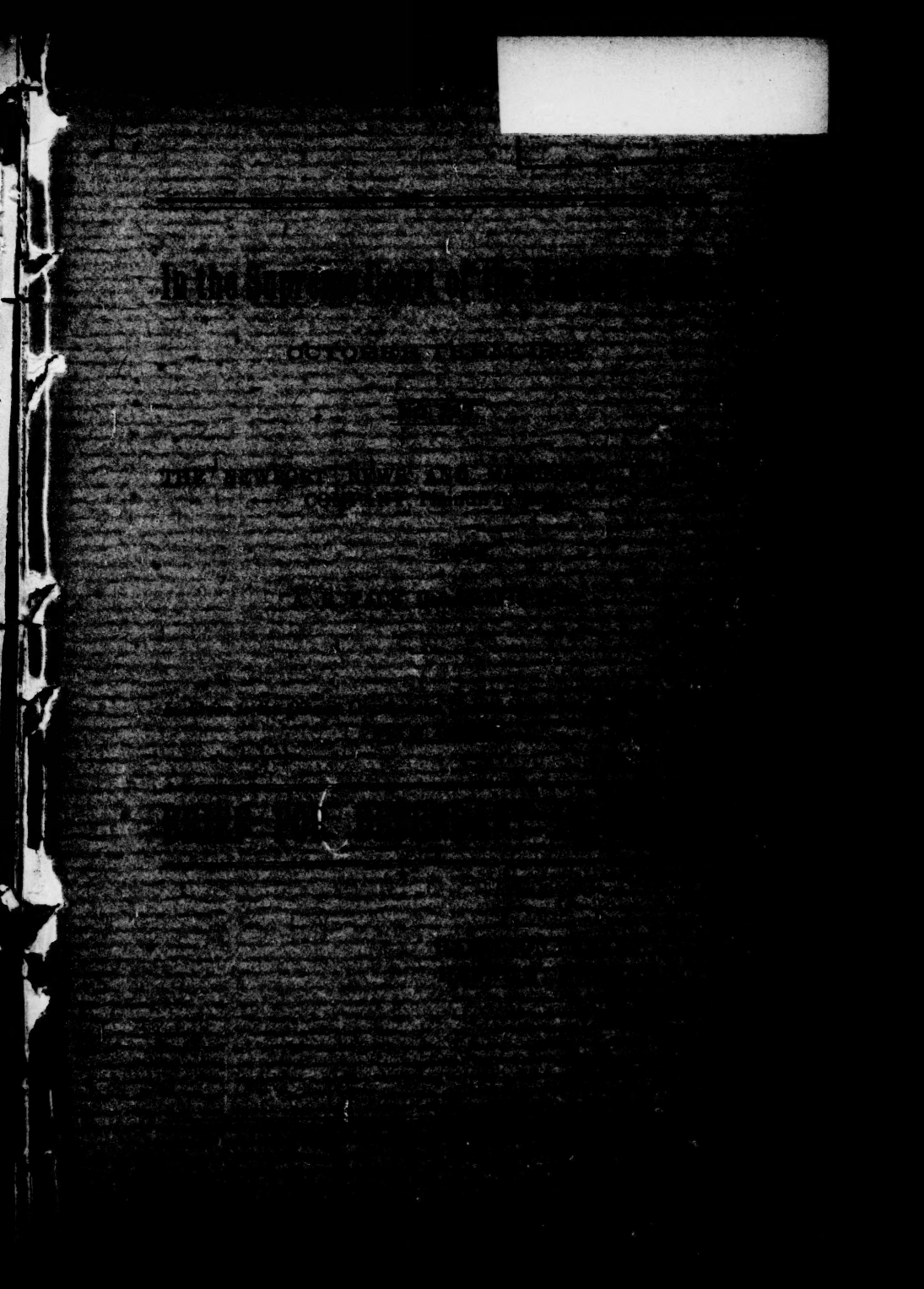
Grouping again and considering all these errors as assigned together as one it is not to be wondered at that the jury returned a verdict for $8,000 for this injury. They were allowed to listen to the repetition by the wife of her husband's "tale of woe," rotten crossties, low joints and rough road at points away from where the uncoupling of Pace's train occurred were exploited in their hearing ; they were instructed to disregard all word of caution or warning of danger, unless spoken in such phrase as that Pace could not have misundersrood that it was imminent ; they were charged to value Pace higher than ordinary sinners, because he was such a good man, so truthful, such a blessing to his

family—and then "in every way you can conceive" that he has been injured to estimate and assess his damage. Acting under such a whip and spur the jury perhaps should not be criticised for the size of the verdict returned by them in favor of the plaintiff, but the very amount of the damages awarded the plaintiff would seem an unanswerable argument to show that the result arrived at by the jury was affected in no slight degree by the errors in the admission of the evidence and in the charge of the Judge, of which we now complain.

POINT VII.

The order denying the motion for a new trial and the judgment of the Court below should be reversed and a new trial ordered.

HOLMES CUMMINS,
MAXWELL EVARTS,
Of Counsel for Plaintiff in Error.



In the Supreme Court of the United States.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY, Plaintiff in Error,

vs.

A. R. PACE, Defendant in Error.

No. 223.—October Term, 1894.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

REPLY BRIEF ON BEHALF OF DEFENDANT IN ERROR.

This case was a suit for damages instituted by defendant in error against plaintiff in error and the Chesapeake, Ohio and Southwestern Railroad Company, in the Circuit Court of Dyer County, Tennessee.

The plaintiff in error filed a petition to remove said case to the Circuit Court of the United States for the Eastern Division

of the Western District of Tennessee, under the Local Prejudice Act of 1887. This petition for removal is set out on pages 1 and 2 of the additional part of transcript of record filed herein, which petition is sworn to by the attorney for petitioner.

The facts in this petition were denied by an answer to said petition filed by defendant in error, which answer is set out on pages 26 and 27 of said additional transcript. The first question to be decided is, did the Circuit Court of the United States have jurisdiction of this case? The act of 1887, section 2, provides, *inter alia*, "when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State Court," etc. The question now is, was it made to appear to the Circuit Court of the United States that the facts alleged in said petition were true?

In case of the Pennsylvania Company, *ex parte*, 137 U. S., p. 451, in the opinion by Justice Bradley, this court says:

> "How must it be made to appear that from prejudice "or local influence the defendant will not be able to obtain "justice in the State Court?" * * *
>
> "Our opinion is that the Circuit Court must be legally "(not merely morally) satisfied of the truth of the allegation "that from prejudice or local influence, the defendant will "not be able to obtain justice in the State Court. Legal "satisfaction requires some proof suitable to the nature of "the case; at least an affidavit of a credible person; and a "statement of facts in such affidavit which sufficiently "evinces the truth of the allegation. *The amount and man-*"*ner of proof required in each case must be left to the discretion* "*of the Court itself.* A perfunctory showing by a formal "affidavit of mere belief will not be sufficient. If the pe-"tition for removal states the fact upon which the allegation "is found, and that petition be verified by affidavit of a "person or persons in whom the Court has confidence this "may be regarded as *prima facie* proof sufficient to satisfy "the conscience of the Court. If more should be required "by the Court more should be offered."

In this case we have not only the affidavit of the attorney for petitioner, but the transcript shows that in addition to said affidavit petitioner procured the affidavits of eleven credible witnesses, nine of whom are made by persons who reside in Dyer county and have resided there for many years. Two of the affiants, to wit: John Eckles and John G. Miller, make oath that they have been in Dyer and adjoining counties and are familiar with the state of feeling in said counties, and all of the eleven affiants prove positively the truth of the fact set out in the petition. These affidavits are set out in the additional transcript from pages 2 to 8 and they were submitted to Judge Howell E. Jackson and were sufficient to satisfy the Court that plaintiff in error had a right to remove said cause, and instead of having the case remanded for trial as to the C., O. & S. W. R. R. Company, the defendant in error dismissed as to said company and tried the case as to the plaintiff in error alone, and defendant in error insists that said Circuit Court had jurisdiction of the case and that it was properly heard and determined by the said Court.

If, however, this Court should be of the opinion that said case was wrongfully removed to the United States Circuit Court and should have been remanded under the pleadings, then defendant in error insists that the plaintiff in error having caused said wrongful removal, should be required to pay all the costs.

See Torrence *vs.* Shedd, 144 U. S., 527;
Martin *vs.* Snyder, 13 S. C., 706;
City of Bellaire *vs.* B. & O. R. R. Co., 13 S. C., 16.

The facts of this case are briefly set out on pages 6 to 10 of the transcript and are in brief that plaintiff below was a cattle and stock dealer who, in September, 1890, contracted with plaintiff in error to transport a car load of cattle and himself from Obion, Tennessee, to Louisville, Kentucky; "that during that night while passing over the road, the train in which he was carried became uncoupled, and the rear portion, on which plaintiff was, was stopped, while the front part ran some distance beyond; that when the front portion of his train No. 1 had been gone 30

minutes it returned very rapidly, striking the cars on which plaintiff was riding violently and knocked them back down the road 100 yards and *a moment thereafter* another train, passing in the same direction he had been going, crashed violently into plaintiff's train, completely demolishing the car in which he was and *severely injuring and bruising him, breaking his lower jaw, fracturing his upper jaw, displacing his lower jawbone, closing one nostril, injuring the sight of both eyes and the hearing of one ear, breaking the malar bone, as well as cutting off a portion of his tongue, besides inflicting bruises upon other parts of his person*; that he was immediately cared for by defendant's employees, carried to the nearest hospital, provided with surgical and other attention, nursed, and cared for as carefully as could be done, but *resulting in his confinement for some weeks; that plaintiff passed quantities of blood from bowels and bladder for some weeks*; also tending to show *that these injuries caused him great anxiety, pain and suffering, bodily and mental; that his life was seriously endangered and shortened, his recovery for some time uncertain, and that these injuries were permanent as to the dislocation of the jaw, which had previously come together properly, the resulting inability to properly close his mouth or masticate his food; that necrosis of malar bone resulted; that these wounds had not yet healed, but were yet still sore and running matter*; that prior to said accident he was 36 years of age and in good health. Plaintiff further introduced proof tending to show that his business had been that of a cattle trader, a dealer in stock, and that because of these injuries he could not henceforth follow this business as well as before being hurt, nor without risk and danger; also tending to show that he was a sober and industrious money-making man, and that his business had been a profitable one."

Mr. Pace sued to recover damages for the injuries he had sustained. The trial lasted six days, and sixty-seven witnesses were introduced (see beginning of charge, Transcript, p. 10). A judgment was rendered in favor of plaintiff below for $8,000, and a motion for a new trial was made and overruled. Plaintiff in error has brought this here by writ of error and asked to have the judgment of the lower court reversed. The plaintiff in error

has filed a brief herein setting out seven different assignments of error. The first and second assignments of error can be considered together, and the ruling of the court complained of was that the trial judge permitted plaintiff, against defendant's objection, to introduce evidence tending to show that he was "a moral, upright man of good character for honor and integrity," and that he had a "reputation for honor and integrity and was a good business man," and asked questions as to his character for truth and veracity. The plaintiff in error says that his character had not been impeached in any way.

The additional transcript contains an affidavit by the attorney for plaintiff in error which is set out on pages 27 and 28 of said transcript. On page 28 said affidavit states:

> "That defendant expects to prove by said Haskins and "Walker that they are practicing physicians of many years' "standing in Dyer County, Tennessee, the same in which "plaintiff resides; that they have known plaintiff for many "years, and that said Haskins has attended plaintiff as his "medical attendant both for the injuries for which this "action is brought and previously for other troubles and "complaints; that, as affiant is informed, said witnesses "will prove that plaintiff's injuries for which he sues are "not permanent, and to a large degree are *feigned* or *simu-*"*lated* and *not real;* that on other occasions one or both "physicians have *detected plaintiff making like simulated claim* "*for or of injury;* that these physicians visited plaintiff or "saw him at divers times other than when he was examined "by Drs. Rogers, Minor, Cowgill and others (such joint ex-"amination being only one time), and can evidence other "facts than those said Rogers and others have testified "about in their depositions herein. Affiant knows of no "other persons by whom the same matters can be proven, "as it expects and believes defendant can and will prove "by said Haskins and Walker, and, as defendants are in-"formed and believe, such evidence of said absent witnesses, "Haskins and Walker, is not merely cumulative, but is or

"will be of facts substantially other and different from "those deposed about by said Rogers and others in the depo- "sitions filed herein."

The depositions of Rogers and others attacking plaintiff were already on file in the record, and the witnesses named in said affidavit were present to testify on the trial, having come to the court after said affidavit was made, and the bill of exceptions on page 9 states "that defendant offered proof tending to show * * * that plaintiff was *feigning his injury* and was not hurt so much nor so seriously as he claimed; that for three months he claimed to have lost all sight from his left eye. However, that at defendant's instance an examination by a commission of a half dozen physicians, surgeons, dentists, etc., was made of plaintiff, who found that plaintiff *was seeing quite well with that eye at the very time he was complaining of being blind.*"

The defendant in error insists that this evidence was admissible for several reasons:

First, the presumption was that plaintiff below was a man of such character as was proven, and if defendant below did not attack his character that presumption would have prevailed; and while it may have taken some time, and delayed the Court some little to make such proof, it was only proving what was already proven and was not reversible error to admit it;

Second, the defense relied upon tended to show that plaintiff was a man who was *feigning, simulating and exaggerating* injuries he claimed to have received, and showing that his character was necessarily bad, and in such case we insist the law to be well settled, as laid down by the Supreme Court of Tennessee in the case of Henry *vs.* Brown, 2 Heiskel, 213, where the Court says:

"The charge as made out in the proof or attempted to "be made out is one involving moral turpitude and an "utter want of honesty such as well may fix a stain on the "character of any man.

* * * "We hold that in such a case evidence of char-
"acter for honesty and integrity such as was proposed was
"admissible. In the case of Brien *vs.* Perry, 3 Caine's
"Cases, 120, Judge Tompkins laid down the rule to be 'that
"in actions of tort, and especially charging the defendant
"with gross depravity and fraud upon circumstances merely,
"evidence of uniform integrity and good character is often-
"times the only testimony which the defendant can oppose
"to suspicious circumstances.'

"Chancellor Walworth in the case of Townsend *vs.* Graves
"(3 Paige, 455), gave the above case his sanction, and held
"the general rule to be 'that where a party is charged with
"a crime or any other act involving moral turpitude which
"is endeavored to be fastened on him by circumstantial evi-
"dence or by testimony of witnesses of doubtful credit, he
"may introduce proof of his former good character for hon-
"esty and integrity to rebut the presumption arising from
"such evidence which it may be impossible for him to con-
"tradict or explain."

See Stott *vs.* Fletcher, 1 Tenn. Rep., 488, Cooper's Ed.

"The rule thus laid down by the learned chancellor
"meets our approval, and we think is well sustained by the
"soundest reason based on the philosophy of human action
"and the well established course of human conduct. It
"may be considered by a liberal application of the princi-
"ple which allows collateral facts to be given in evidence
"when they have offered any reasonable presumption or
"inference as to the principal fact or matter in dispute.
"Greenleaf on Evidence, Section 59."

In the case of Hills *vs.* Goodyear, 4 Lea, Tenn. Report, 233, in an opinion by Judge Cooper, on page 240, he says:

"Evidence of good character is admitted in criminal
"prosecution because the intent with which the act charged

" as a crime was done is of the essence of the issue, and the " prevailing character of the defendant's mind is evidenced " by his previous habits of life and is a material element in " discovering that intent. Upon the same principle like evi- " dence ought to be admitted in all other cases, whatever be " the form of proceeding, when the intent to be found is a " fact involved in the issue."

It can be no objection to this evidence that it was introduced in chief, instead of in rebuttal, because the depositions were then on file and the witnesses were then present attempting to prove that plaintiff was feigning his injuries, etc. The Court charged, among other things, "now for the defendant it is said that the plaintiff simulates and exaggerates the injuries he has received."

Transcript, page 13, side page 125.

This evidence is also admissible on another ground, viz: that defendant in error has the right to prove his qualifications as a money-maker, the proof having shown "that he was permanently injured and that his life was shortened;" "that because of these injuries he could not henceforth follow his business as well as before being hurt nor without risk and danger." These qualities, which he proved, tended to make him more likely to retain the business he had, and to continue to make money, and we insist that he had a right to prove all about himself (as the Court stated) so that the jury might know just what manner of a man Mr. Pace was. His pecuniary loss depended greatly upon his business qualifications and character. When the Court charged the jury, he charged them to allow Mr. Pace only *compensation* for the injuries he had received, and cautioned them to render a fair and impartial decision, and when this court considers that he was only 36 years of age, a good business man, a money-making man, and that he had his tongue cut off, both his upper and lower jaws broken, his jaw bone displaced so that he could not close his mouth nor masticate his food, one nostril closed, the sight of both eyes and the hearing of one ear impaired, and

his life seriously endangered and shortened; that necrosis of the malar bone resulted; that these wounds had not yet healed but were still sore and running matter, the court will see that the jury were very moderate indeed in awarding compensation, and that the judgment was very reasonable under all the circumstances of the case.

Another exception is that the court permitted plaintiff below to show "that at the place of collision the railroad track was rough, with many low joints and rotten ties, and in very bad condition at the time of the wreck. This was admissible. It is true that the collision was first at the front end and next at the rear end, but the declaration (on page 2 of the Transcript, side page 30,) charged that on account of the "overloaded condition of said train and the bad condition of said railroad track and of the negligent and insecure and unsafe manner in which the said train was attached or fastened together, broke in two, and the rear part of said train, including the caboose, was left standing on the track."

But after this proof was introduced the plaintiff in error admitted its negligence in bringing about this collision, and did not deny its liability; and then this question became immaterial. The trial judge, *inter alia*, charged (page 11, Transcript, side page 116,):

> "Now, gentlemen of the jury, the liability of the defend-
> "ant is not at all denied. It is wholly immaterial how this
> "collision happened; whether by reason of some defect in
> "the road-bed, or by bad management of the trains, or fail-
> "ure of the flagman to warn section 2, or whether a combi-
> "nation of all these, is wholly immaterial. * * * It is
> "conceded that they were negligent in bringing about this
> "collision, and that unless there is some fact on the part of
> "the plaintiff that relieves them, they are liable for any
> "damages he may have sustained."

So the plaintiff in error having admitted its liability, and the court having charged as above, this court can see that no injury

accrued to the plaintiff in error by the admission of the evidence complained of.

> "They made a contract with this plaintiff that he might "ride on those cars as part and parcel of carrying his cattle, "and when they accepted him as a passenger in that way "they owed him all safety in carrying that they were bound "to accord to such a train as that—that is to say, they were "bound to use care in carrying him safely upon their freight "trains, but not such special care, perhaps, as if he had "been travelling on a passenger train, where it is the duty "of the company to exercise the utmost care for the lives of "the passengers; but he was entitled to have all those pro- "visions for safety which would ordinarily prevent accidents. "He did not receive that care in this case and is therefore "entitled to recover by reason of their negligence, but not, "as they concede on his part, any punitive damages such as "might exhibit your indignation and determination to com- "pel this railroad company, by punishment, to perform its "duty. That being so, it is not necessary to go into the "negligence as gross or otherwise, and therefore you need "not consider that question at all."

The next assignment by plaintiff in error is that the court erred in permitting defendant in error on re-examination to examine the wife of A. R. Pace as to complaint made by her husband; she having on cross examination been asked about that by the plaintiff in error, we insist that defendant in error had a right to re-examine her as to said matter.

The next error complained of is that the court charged in regard to contributory evidence as requested by plaintiff in error and that the additional charge qualifying said request was in error. The proof shows the train broke in two 30 *minutes* before the accident. (See botton line of page 6 of Transcript.) So that the court will see that the train which was following the one upon which the defendant in error was riding was thirty minutes behind it—say some 10 or 12 miles—and the court properly instructed the jury that defendant in error had a right to rely

upon the rules being obeyed and all proper precautions being taken to warn the approaching train. The evidence in regard to this matter is set out near the bottom of page 8 of the Transcript and tends to show "that at the time the plaintiff's train broke in two or became uncoupled he was warned both by the conductor and brakeman of the danger of their position and of the fact that another train was following them and might not be signalled in time to prevent a collision, and that safety required him to get off of the cars and look out lest he be killed, all of which was denied by the plaintiff. Also tending to show that while proper and sufficient signals against the following train, as required by the rules (compliance with which would have prevented the accident), had not been given by its employees, yet that its brakeman did not go back more than 1,000 feet behind where plaintiff's train had stopped, and that signals were properly placed and given there, but that it was impossible from that point to have stopped the following train in time to have avoided the collision."

The plaintiff in error admits that they did not give proper and sufficient signals as required by their rules, "compliance with which would have prevented the accident," and the court can see that they had plenty of time for the brakeman to have gone back several times 1,000 feet, and the defendant in error could not be charged with negligence in believing that plaintiff in error would do its duty under the circumstances, and in acting in accordance with that belief, and the additional charge or modification made by the trial judge was not only legal, but was highly proper under the circumstances.

The next error complained of is that the court told the jury, among other things, to "look into the character and extent of the injury, and as to its duration in point of time and in every way you can conceive *from this proof* that Mr. Pace can be *physically affected* by the injury received by him." The plaintiff in error argues it as if the court permitted the jury to speculate as to every element they could conceive of; but the court will see that this particular part of the charge restricts the jury *to this proof*, and to the *physical effects* of the injury received.

The defendant in error insists that the portion of the charge complained of was correct because the jury was limited to the proof introduced in the trial as to the physical injury, and were cautioned time and again in the charge to allow Mr. Pace only compensatory damages. The court stated that "it comes back for a fair and impartial jury *to determine what will compensate that man*, not some other man, not some other injury, but *for the injury he actually has received.*"

While some detached or garbled extracts from the charge may seem to be erroneous, yet when this court examines the entire charge and considers it as a whole it will see that no injury was done to the plaintiff in error, and when it considers the great and permanent injury sustained by defendant in error, and that he was in the prime of life, a fine money-maker, and a man of such character that he would likely continue to be a good money-maker, it will see that the jury were very reasonable indeed in allowing compensation, and we insist that the judgment of the Circuit Court should be affirmed.

The bill of exceptions does not contain, nor does it claim to contain, all the evidence introduced on the trial of the case, but as a matter of fact it introduces the evidence in regard to the exceptions made by plaintiff in error, and only a small part of the other evidence, and the circuit judge who heard the entire case was satisfied to let the judgment stand, and this court can see that the defendant in error has recovered only reasonable compensation for the injuries sustained by him, and we insist that the judgment of the lower court should be affirmed.

HAMILTON PARKS,
HENRY W. McCORRY,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 293.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY,

Plaintiff in Error,

against

A. R. PACE,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Reply Brief of Plaintiff in Error.

HOLMES CUMMINS,
MAXWELL EVARTS,
Of Counsel.

(18,000 words, Press of Byron S. Adams, Washington, D. C.)

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 223.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY,
Plaintiff in Error,

AGAINST

A. R. PACE,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

BRIEF OF PLAINTIFF IN ERROR IN REPLY.

Point I.

Was the removal of this case by the plaintiff in error from the State Court of Tennessee to the Circuit Court of the United States permitted by the provisions of the Act of Congress approved August 13th, 1888, Ch. 866?

The case was commenced in the Circuit Court of Dyer County, Tennessee, in November, 1890, by A. R. Pace, a citizen of Tennessee, against the Chesapeake, Ohio and Southwestern Railroad Company, a corporation organized and existing under the laws of the

State of Tennessee, and the Newport News and Mississippi Valley Company, a corporation organized and existing under the laws of the State of Connecticut. The declaration states a cause of action against the defendants as joint tort-feasors. On the 25th day of November, 1890, a petition for the removal of the case to the United States Circuit Court for the Eastern Division of the Western District of Tennessee together with a proper bond was filed in the Circuit Court of Dyer County by the defendant The Newport News and Mississippi Valley Company (Additional Record, pp. 10, 11 and 12). The plaintiff filed an answer to this petition on the 3d day of December, 1890, denying the allegations contained therein (Additional Rec., pp. 13, 14 and 15), and thereupon the application for the removal of the case to the United States Circuit Court was denied by the Circuit Court of Dyer County and an order entered by said last named Court to that effect (Additional Rec., p. 24).

Thereafter and on the 21st day of March, 1891, the defendant The Newport News and Mississippi Valley Company (the Connecticut corporation) filed a petition in the United States Circuit Court for the Western District of Tennessee asking for the removal of the case to that court under the fourth paragraph of Section 2 of the Act of August 13th, 1888, Chap. 866, upon the ground that, because of prejudice and local influence, the petitioner would be unable to obtain justice in said State Court or any other State Court to which it might under the laws of Tennessee have the right to remove the cause (Additional Rec., pp. 1 and 2). There were filed with the petition and as part thereof various affidavits showing the prejudice and local influence against the petitioner (Additional Record, pp. 2, 3, 4, 5, 6 and 7), and also a proper and sufficient bond as required by the statute (Additional Rec., p. 8). Upon the presentation of the petition, affidavits and bond the United States Circuit Court, by Mr. Justice JACKSON, thereupon ordered the removal of the case from the Circuit

Court of Dyer County to the United States Circuit Court for the Western District of Tennessee (Additional Rec., pp. 8 and 9). On the 5th of May, 1891, the plaintiff filed in said last-mentioned Court an answer to the petition of the Newport News and Mississippi Valley Company (Additional Rec., pp. 26 and 27), but no trial of any issue raised thereby seems to have taken place, for the reason, apparently, that the plaintiff, on the 7th of May, 1891, dismissed its suit against the defendant The Chesapeake, Ohio and Southwestern Railroad Company (Original Rec., p. 5), which last-named defendant had, on the 25th of November, 1890, in the State Court, filed a plea in abatement to the declaration of the plaintiff (Additional Rec., p. 13). After the removal of the case to the United States Court the plea of abatement was withdrawn by leave of the Court on the 4th day of May, 1891, and permission given to The Chesapeake, Ohio and Southwestern Railroad Company to file a plea of not guilty (Additional Rec., p. 25), which plea was filed on the 5th of May, 1891 (Additional Rec., p. 29), and the next day after but one the case was dismissed as to The Chesapeake, Ohio and Southwestern Railroad Company (Original Rec., p. 5), leaving the case between the plaintiff, a citizen of Tennessee, and The Newport News and Mississippi Valley Company, a citizen of Connecticut.

To restate the material facts of the case bearing upon this point, the plaintiff was a citizen of Tennessee, the defendant The Chesapeake, Ohio and Southwestern Railroad Company was also a citizen of Tennessee, and the removing defendant The Newport News and Mississippi Valley Company was a citizen of Connecticut. The question which then arises is whether, when an action is commenced in a State Court by a citizen of the State against a citizen of the same State and a citizen of another State, the latter can remove the case to the United States Circuit Court under the fourth paragraph of the second section of the Act of August 13th, 1888, Ch. 866.

It seems that this question has not been decided in this Court, as it was said by Mr. Justice GRAY in Hanrick vs. Hanrick, 153 U. S., 192, 197, when discussing this clause of the Removal Act: "Whether this act permits one of two or more defendants to remove any case which he could not have removed under earlier statutes is a question upon which there have been conflicting decisions in the Circuit Courts, and upon which we are not now required to express a definitive opinion."

Although the precise question presented by the case before us has not been passed upon by this Court, yet the reference in the Hanrick case to the Removal Acts which preceded the Act of August 13th, 1888, Ch. 866, and the cases construing the meaning of the phrases therein contained, which are practically the same as the words in the paragraph now under consideration, would seem to lead to the conclusion that the true construction of the local prejudice clause of the present Removal Act in cases where there are two or more defendants is that in order to present a case which is properly removable thereunder all the defendants must be citizens of some State other than the State in which the cause is brought.

The second paragraph of the 2d section of the Act of August 13th, 1888, enacts that certain suits, "of which the Circuit Courts of the United States are given jurisdiction by the preceding section" may be removed from a State Court to the United States Circuit Court. Turning to the preceding section it there appears that the Circuit Court has jurisdiction, with a certain limitation as to the amount thereof, over all suits "in which there shall be a controversy between citizens of different States." It has always been held that, before a removal could be made under these provisions, all the defendants must be non-residents of the State in which the action was brought and that all of them must join in the petition for removal. The paragraph of the act which we are now

considering (4th Paragraph, Sec. 2 of Act of August 13, 1888) provides for the removal under certain conditions of cases from the State Court, "in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." It is difficult to see any difference upon the immediate point in question between the phrase just quoted and the clause in the first section of the Removal Act, which is referred to in the second paragraph of section two of said act. If in cases coming within the latter clause all the defendants must be non-residents of the State in which the suit is commenced before a removal of the case into the United States Court can be had, it would seem to follow that such must also be the situation before a removal can be had under the local prejudice clause of the same act. An important difference between cases arising under the second paragraph and the fourth paragraph of the second section of this act is that under the former all the defendants must join in the petition for removal, while under the provision of the local prejudice clause a single defendant can remove the case, but aside from this the two paragraphs would seem to be alike in requiring that all the defendants should be non-residents of the State in which the suit is brought before a case is presented which can be removed from the State Court to the United States Circuit Court.

Point II.

The defendant in error at page 6 of his brief argues that, as there was a possibility that his character might have been attacked in the course of the trial, it was proper for him to offer evidence of his good reputation, etc. This is contrary to the rule, as we under-